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No. 276.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

A. F. MIGEON, B. TIBBEY and
N. B. RINGELING,
Appellants,
vs.
THE MONTANA CENTRAL
RAILWAY COMPANY.)

TRANSCRIPT OF RECORD.

Appeal from the United States Circuit Court, for
the District of Montana.

FILED

MAR 23 1896

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*In the Circuit Court of the United States, Ninth Judicial
Circuit, District of Montana.*

THE MONTANA CENTRAL RAIL-
WAY COMPANY,

PLAINTIFF,

vs.

ACHILLE F. MIGEON, BENJAMIN
TIBBEY AND NICHOLAS RING-
ELING,

DEFENDANTS.

BE IT REMEMBERED, that on the 24th day of Decem-
ber, A. D. 1891, a transcript from the District Court of
the Second Judicial District of Montana Territory, in
and for Silver Bow county, was filed herein, which said
transcript is in the words and figures following, to-wit:

*In the District Court of the Second Judicial District, of
Montana Territory, in and for Silver Bow County.*

THE MONTANA CENTRAL RAILWAY COM-
PANY,

Plaintiff,

vs.

ACHILLE F. MIGEON, BENJAMIN TIBBEY
and NICHOLAS RINGELING,

Defendants.

Complaint.

The above-named plaintiff complains of the above-
named defendants, and alleges:

1. That plaintiff is now and for more than six months last past has been a railroad corporation duly created and organized under and by virtue of the laws of Montana Territory for the purpose of locating, constructing, operating and maintaining railroads, and with all the rights, privileges and powers conferred by said laws, as well as by the Acts of Congress in such cases made and provided.

2. That plaintiff is now the owner against all persons except the Government of the United States and entitled to and in the possession of, and plaintiff and its grantors and predecessors in interest under and through whom it claims have been for more than five years last past the owners against all persons except the Government of the United States and entitled to the possession of the following described lots and parcels of ground, both situated in Summit Valley Mining District in the County of Silver Bow and Territory of Montana, and being portions of mineral entry No. 511 made by Kohn Noyes and others, to wit: (1) Beginning at a point on the south boundary of lot 346, the alleged "Childe Harold" lode claim hereinafter mentioned, in Township 3 north, of Range 8 west, from which the southwest corner of said lot 346 bears south 79 deg. 45 min. west 34 feet distant, and running thence north 79 deg. 45 min. east 127 feet, thence north 57 deg. 45 min. east 492 feet, thence north 77 deg. 18 min. west 564 feet, thence south 57 deg. 45 min. west 188 feet, thence south 23 deg. east 160 feet, thence south 32 deg. 55 min. east 194 feet to the place of beginning, containing an area of 3.67 acres more or less.

(2) Beginning at corner No. 3 of lot 170, the alleged "Childe Harold" lode claim hereinafter mentioned, in Township 3 north, of Range 7 west, and running thence south 79 deg. 45 min. west 762 feet, thence south 18 deg. 21 min. east 386.5 feet, thence north 57 deg. 45 min. east 16 feet, thence south 32 deg. 55 min. east 223.5 feet, thence north 79 deg. 45 min. east 578 feet, thence north 0 deg. 01 min. west 402 feet, thence north 23 deg. west 193 feet to the place of beginning, containing an area of 9.60 acres more or less.

(3) That the above-named defendants claim some right, title, or interest adverse to plaintiff in or to both and each of said above-described lots or parcels of ground, and as plaintiff is informed and believes said defendants claim said right, title or interest under or by virtue of an alleged location of a pretended lode claim called the "Childe Harold," and said defendants did on or about the 27th day of September, 1887, make and file in the United States Land Office at Helena, Montana Territory, their application for a patent to them from the United States for said alleged "Childe Harold" lode claim, and in said application said defendants embraced and included and claimed to be the owners of and entitled to a patent for both and each of said lots and parcels of ground owned by plaintiffs, and hereinabove described by survey as parts of said alleged "Childe Harold" lode claim. That afterwards, to wit, on or about the 26th day of November, 1887, and within the time required by law, plaintiff duly made and filed in said land office its adverse claim to defendants' said application for patent so far as the same included or related to or affected plaintiff's said

above-described lots and parcels of ground, and thereupon proceedings upon said application for patent were stayed in said land office, and this action is commenced within thirty days thereafter.

(4) That defendants have no right, title or interest either in law or in equity of, in or to said above-described lots and parcels of ground, or either of them, or any part thereof, and defendants' claim thereto is without foundation in law or in fact, and that the right of plaintiff thereto is prior in time and superior in right to any right of defendants thereto; but that notwithstanding the premises defendants still persist in claiming right or title to plaintiff's said above-described lots and parcels of ground and in prosecuting their said application for patent therefor, as above stated, and thereby by their said claim or acts cast a cloud upon the right and title of plaintiff in and to its said above-described lots and parcels of ground, and greatly interfere with and injure plaintiff in its use and enjoyment thereof.

Wherefore, plaintiff asks the aid of this court in the premises, and that defendants appear herein and set out fully and particularly the nature and character of the right or interest claimed by them in or to plaintiff's said above-described lots and parcels of ground; that plaintiff be adjudged and decreed to be the owner and entitled to the possession of said above-described lots and parcels of ground and every part thereof, and that the right of possession thereto is in plaintiff; that defendants be adjudged and decreed to have no right, title or interest in or claim to the same as against plaintiff and be perpetually enjoined and restrained from further or hereafter

claiming any right, title or interest therein or thereto, and from further prosecuting their said application for patent therefor, and that plaintiff have such other and further relief in the premises as the nature and circumstances of the case may require and as to equity belongs, and that it recover of defendant its costs of this action.

W. W. DIXON,

Atty. for Plaintiff.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

W. W. Dixon, being duly sworn says, that he is the attorney of the Montana Central Railway Company, which is a corporation and the plaintiff in the above-entitled action; that affiant makes this affidavit of verification for the reason that all the officers of said plaintiff corporation are absent from said Silver Bow county where affiant resides and where this action is brought, and that affiant has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true to affiant's best knowledge, information and belief.

W. W. DIXON.

Subscribed and sworn to before me, this 3d day of December, A. D. 1887.

[SEAL]

CHARLES S. WARREN,
Notary Public, Montana Ter'y.

[Endorsed]: Title of Court. Title of Cause. Complaint. Filed December 3d, 1887. Wm. F. Shanley, Clerk. By Charles S. Warren, Deputy Clerk. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

In the District Court of the Second Judicial District of the Territory of Montana, in and for the County of Silver Bow.

THE MONTANA CENTRAL RAILWAY COMPANY,	}
Plaintiff,	
vs.	
ACHILLE F. MIGEON, BENJAMIN TIBBEY and NICHOLAS B. RINGELING,	}
Defendants.	

Summons.

The People of the Territory of Montana send Greeting to Achille F. Migeon, Benjamin Tibbey and Nicholas B. Ringeling, defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Second Judicial District of the Territory of Montana, in and for the County of Silver Bow, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days; or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to quiet title as follows: This action is brought to obtain a decree of this court that plaintiffs be adjudged and decreed the owner and

entitled to the possession of the following described premises situated in Summit Valley Mining District, Silver Bow county, Montana Territory, and being in conflict with the alleged "Childe Harold" quartz lode mining claim, which said premises are particularly bounded and described as follows, to wit, and being a part of mineral entry No. 511, made by John Noyes et al. as follows: Beginning at the south boundary of lot No. 346, the alleged "Childe Harold" lode, in Township 3 north, of Range 8 west, from which the southwest corner of lot 346 bears south 79 deg. 45 min. west 34 feet distant, and running thence north 79 deg. 45 min. east 127 feet, thence north 57 deg. 45 min. east 492 feet; thence north 77 deg. 18 min. west 564 feet; thence south 57 deg. 45 min. west 188 feet; thence south 23 deg. east 160 feet; thence south 32 deg. 55 min. east 194 feet to the place of beginning, and containing an area of 3.67 acres, more or less. Also, beginning at corner No. 3, lot No. 170, the alleged "Childe Harold" lode claim, in Township 3 north, of Range 7 west, and running thence south 79 deg. 45 min. west 762 feet; thence south 18 deg. 21 min. east 386.5 feet; thence north 57 deg. 45 min. east 16 feet; thence south 32 deg. 55 min. east 223.5 feet; thence north 79 deg. 45 min. east 578 feet; thence north 0 deg. 01 min. west 402 feet; thence north 23 deg. west 193 feet to the place of beginning, containing an area of 9.60 acres, more or less. That defendants be compelled to appear herein and set out particularly the nature and character of the right or interest claimed by them in or to the said above-described portion of

plaintiff's mineral entry No. 511. That defendants be adjudged and decreed to have no right, title or interest in or claim to said premises as against plaintiff, and be perpetually enjoined and restrained from further or hereafter claiming any right, title or interest herein or hereto, and from further prosecuting their application for patent therefor, and for such other and further relief as to equity belongs, and for costs of suit, all of which will more fully appear by reference to plaintiff's complaint herein on file.

And you are hereby notified that if you fail to appear and answer said complaint, as above required, the said plaintiff will take a default against you and apply to the Court for the relief demanded in the prayer of plaintiff's complaint.

Given under my hand and the seal of the District Court of the Second District of the Territory of Montana, in and for the County of Silver Bow, this 10th day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL]

WM. F. SHANLEY, Clerk.

By. C. V. Henderson, Deputy Clerk.

I hereby certify that I received the within summons on the 10th day of Dec., A. D. 1887, and personally served the same on the 15th day of Dec., A. D. 1887, by showing the original and delivering a true copy thereof to each of said defendants, Benjamin Tibbey and Nicholas B. Ringeling, and after due and diligent search have been unable to find defendant, A. F. Migeon, in Silver Bow

county, M. T., at Butte, in the County of Silver Bow, M. T., they being the defendants named in said summons.

Dated this 16th day of Dec., A. D. 1887.

JOHN E. LLOYD, Sheriff.

By T. E. Lloyd, Deputy Sheriff.

Service, 2-1.00

Mileage, 8-1.20

2.20

[Endorsed]: Title of Court. Title of Cause. Summons. Filed Dec. 16, 1887. Wm. F. Shanley, Clerk. By C. V. Henderson, Deputy Clerk. W. W. Dixon, Attorney for Plaintiff. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

Second Judicial District Court, Silver Bow County, Montana.

THE MONTANA CENTRAL RAILWAY COMPANY,

Plaintiff,

against

ACHILLE F. MIGEON ET AL,

Defendants.

Demurrer to Complaint.

Now come the defendants above named and demur to the complaint on file in the above case on the ground that the same does not set forth facts sufficient to constitute a cause of action.

WILLIAM H. DEWITT,

Defendants' Attorney.

[Endorsed]: Title of Court. Title of Cause. Demurrer. Filed Dec. 21, 1887. Wm. F. Shanley, Clerk. By C. V. Henderson, Deputy Clerk. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

Second Judicial District Court, Silver Bow County, Montana Territory.

<p>THE MONTANA CENTRAL RAILWAY COMPANY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">against</p> <p>ACHILLE F. MIGEON, BENJAMIN TIBBEY, and NICHOLAS B. RINGELING,</p> <p style="text-align: center;">Defendants.</p>	}
---	---

Answer to Complaint.

The defendants in the above-entitled action, for answer to plaintiff's complaint, on file herein :

Deny that plaintiff is now, or at the time of filing the complaint or ever was a railroad corporation duly created or organized under or by virtue of the laws of Montana Territory for the purpose of locating, constructing, operating, or maintaining railroads, or with any of the rights, privileges, or powers conferred by such laws or the Acts of Congress, as far as any operations or acts of plaintiff are concerned in the County of Silver Bow, Montana Territory, in which county is situated the premises in controversy in this action.

Deny that plaintiff, at the time of filing the complaint

was, or is now, or ever was (against all, or any persons except the Government of the United States, or at all), the owner or entitled to, or in possession of, the premises particularly described in the complaint as in controversy and as part of mineral entry No. 511, by John Noyes et al., in Summit Valley Mining District, Silver Bow county, Montana Territory: and deny that plaintiff, or its grantors or predecessors in interest, have been for more than five years last past, or at all, the owners against any persons or entitled to any possession of said premises in controversy.

Defendants admit that they claim said premises by virtue of the location of the "Childe Harold" lode mining claim mentioned in the complaint, but deny that said claim is a pretended or alleged one, but is valid and subsisting as hereinafter set forth.

Defendants deny that they have no right, title or interest, in law or in equity, of, in or to the said lots or parcels of ground, or either of them, or any part thereof; deny that defendants' claim to said premises is without foundation in law or in fact; deny that the alleged right of plaintiff thereto is prior in time or superior in right to the right of defendants thereto, and deny that by any acts described in the complaint, or at all, the defendants cast any cloud upon any valid or lawful right or title of plaintiff in or to the said premises, or any part thereof, or interfere with, or injure plaintiff in any lawful use or enjoyment of the same.

As a further and separate defense to plaintiff's complaint, and an affirmative cause of action against plaintiff, and in answer to plaintiff's prayer that defendants appear

and set out fully the nature and character of their (defendants') claim to said premises, the defendants allege that at all times herein mentioned the defendants and each of them were and still are citizens of the United States of America. ;

That at the date of the inception of the pretended title of the grantors and predecessors in interest of the plaintiff in and to the premises described in the complaint by metes and bounds as part of the alleged mineral entry No. 511 of John Noyes and others, and at the date of the application for a United States patent for said premises included in said mineral entry No. 511 by said John Noyes and others, and long before and including the premises herein in controversy, there was known to exist, and ever since has been and now is known to exist, within the limits of said pretended placer mining claim of John Noyes and others, and within the limits of the premises herein in controversy, a vein or lode of quartz-bearing silver and copper, which never was, and is not now, the property of or claimed by the said John Noyes and others, or their successors in interest, the plaintiff herein.

That when said John Noyes and others made application for patent to the United States for the alleged placer mining ground included within said mineral entry, No. 511, they did not include in said application, and never have so included, the said vein or lode of quartz, nor has the plaintiff ever applied for patent for said vein or lode of quartz.

That defendants are now the owners of and in the possession, and entitled to the possession of, and they and their grantors and predecessors in interest have at all times

been the owners and in the possession, and entitled to the possession of the vein or lode of quartz above described as known to exist at the time of the said application for patent, together with the surface ground connected therewith and allowed to them under the laws of the United States in reference to the location and holding of veins or lodes of quartz, which said vein or lode of quartz together with said surface ground is by metes and bounds described as follows, to wit: Beginning at the southwest corner of said claim, which is located, known, and designated as Childe Harold, from which the section corner to sections 18 and 19, Township No. 3 north, Range No. 7 west, and sections Nos. 13 and 24, Township No. 3 north, Range No. 8 west, bears south twenty-one deg. and eight min. east 250 feet distant, running thence north 79 deg. 45 min. east 1500 feet to corner No. 2; running thence north 23 deg. west 600 feet to corner No. 3; running thence south 79 deg. 45 min. west, 1500 feet to corner No. 4; running thence south 23 deg. east 600 feet to the place of beginning, corner No. 1, within the limits of which last described premises is the said vein or lode of quartz, and the surface ground included in the above description is necessary and essential to the working and development of the said "Childe Harold" lode or vein, said premises being in Summit Valley Mining District, Silver Bow county, Montana Territory, and designated by United States government survey as lot No. 346.

That the pretended placer mining claim, mineral entry No. 511 by John Noyes and others, from which plaintiff claims to derive title, overlies and includes a

portion of said "Childe Harold" claim, which said portion so included is described as the premises in controversy in the complaint.

That plaintiff has no right, title or interest either in law or in equity of, in or to said "Childe Harold" lode claim or any part thereof, and its claim thereto is without foundation in law or in fact, and its claim thereto casts a cloud upon the right and title of the defendants in and to said "Childe Harold" claim, and interferes with and injures defendants' use and enjoyment of the same.

Wherefore, defendants pray the decree of this court:

1st. That defendants be adjudged and decreed to be the owners and entitled to the possession of said described "Childe Harold" lode claim and every part and parcel thereof, and that the right of possession thereto is in the defendants.

2d. That plaintiff be adjudged and decreed to have no right, title or interest in, or claim to, said premises against defendants.

3d. That plaintiff be forever enjoined and restrained from setting up any claim or title in or to said premises or any part thereof.

4th. For their costs herein.

5th. For such other and further relief as the defendants may show themselves entitled to, or as to the court may seem just.

WM. H. DEWITT and
KNOWLES & FORBIS,
Defendants' Attorneys.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

Nicholas B. Ringeling being duly sworn says that he is one of the defendants named in the foregoing answer; that he heard read the same and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

NICHOLAS B. RINGELING.

Subscribed and sworn to before me, this 7th day of May, 1888.

WM. H. DEWITT,
Notary Public.

[Endorsed]: Title of Court. Title of Cause. Answer. Filed May 7, 1888. Frank E. Corbett, Clerk. By C. V. Henderson, Deputy. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

*In the District Court of the Second Judicial District of
Montana Territory, in and for Silver Bow County.*

THE MONTANA CENTRAL RAILWAY COM-	}
PANY,	
	Plaintiff,
vs.	
ACHILLE F. MIGEON, BENJAMIN TIBBEY	}
and NICHOLAS B. RINGELING,	
	Defendants.

Demurrer to Answer.

Now comes plaintiff and demurs to the alleged further and separate defense to plaintiff's complaint and affirmative cause of action against plaintiff, contained in the answer of defendants herein filed, and commencing on the second page of said answer, and for grounds of demurrer states :

1st. That the same does not state facts sufficient to constitute a defense to the matters alleged in the complaint.

2d. That the same does not state facts sufficient to constitute an affirmative or any cause of action against plaintiff.

3d. That the same does not state facts sufficient to show any title in defendants to the premises in controversy as a lode claim as against plaintiff's title thereto as placer mining ground under patent from the United States.

4th. It is not alleged in said alleged defense or cause

of action that the alleged lode or vein stated to have been known to exist at the time of the application of the said John Noyes and others for patent to said placer mining ground was at said time or is now, such a vein or lode as is described in Section 2320 of the Revised Statutes of the United States, or that it contained or was known to contain any valuable mineral deposits.

Wherefore, plaintiff asks decree and relief as in its complaint herein.

W. W. DIXON,
Atty. for Plff.

[Endorsed]: Title of Court. Title of Cause. Demurrer to Part of Answer. Filed May 17, 1888. Frank E. Corbett, Clerk. By C. V. Henderson, Deputy. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

In the District Court of the Second Judicial District of Montana Territory, in and for Silver Bow County.

THE MONTANA CENTRAL RAILWAY COMPANY,

Plaintiff,

vs.

ACHILLE F. MIGEON, BENJAMIN TIBBEY
and NICHOLAS B. RINGELING,

Defendants.

Replication to Answer.

Now comes plaintiff and for replication to the answer and affirmative cause of action of defendants herein filed.

denies that at the date of the inception of the title of the grantors or predecessors in interest of plaintiff in or to the premises described in the complaint by metes and bounds as part of mineral entry No. 511 of John Noyes and others, or at the date of the application for United States patent for said premises included in said mineral entry No. 511, by said John Noyes and others, or long or at all before, or including the premises herein in controversy, there was known to exist or ever since or at all has been or now is known to exist within the limits of said placer mining claim of John Noyes and others, or within the limits of the premises herein in controversy, a vein or lode of quartz, bearing silver or copper, which never was or is not now, the property of or claimed by said John Noyes and others, or their successor in interest, the plaintiff herein.

Plaintiff admits, that when said John Noyes and others made application for patent from the United States for the placer mining ground included within said mineral entry No. 511, they did not include in said application, and never have so included, any vein or lode of quartz, and that plaintiff has never applied for patent for any vein or lode of quartz within the premises herein in controversy, and plaintiff avers that at the time said John Noyes and others made their application for patent for the ground included in said mineral entry No. 511, no vein or lode of quartz, such as is described in the laws of the United States, was then or afterwards, before the issue of said patent, known to exist within the premises herein in controversy, and such vein or lode, if

any there was, was conveyed by said patent to said Noyes and others, and by them to plaintiff.

Plaintiff denies that defendants are now the owners of, or in the possession, or entitled to the possession of, or that they or their grantors or predecessors in interest, have at all times or at all, been the owners or in the possession or entitled to the possession of any vein or lode described in their answer herein, or known to exist at the time of the application of said John Noyes and others for patent to said mineral entry No. 511, within the limits of the ground in controversy in this action, together with any surface ground connected therewith or allowed to them under the laws of the United States, in reference to the location or holding of veins or lodes of quartz or otherwise, or any of the veins or lodes or surface ground described in said answer by metes or bounds, or otherwise, or of any vein or lode or ground whatever within the limits of the ground claimed by plaintiff in its complaint herein, and plaintiff denies that there is any vein or lode within the limits of the ground last described in defendants' answer, or that the surface ground therein described, or any of it, is necessary or essential to the working or development of any lode or vein therein.

Plaintiff denies that it has no right, title or interest, either in law or in equity of, in or to the alleged "Childe Harold" lode claim or any part thereof, or that its claim thereto is without foundation in law or in fact or that its claim thereto, casts a cloud upon any right or title of defendants to said alleged claim or interferes with or injures defendants' use or enjoyment of the same, and

avers that it is the owner of the premises and property described in its complaint herein, and of so much of the alleged "Childe Harold" lode claim and premises as is included within said property described in said complaint, and plaintiff denies that there is any such lode as the alleged "Childe Harold" lode.

Plaintiff having fully replied asks judgment and decree as in its complaint herein. W. W. DIXON,
Atty. for Plaintiff.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

W. W. Dixon, being duly sworn, says that he is the attorney of the Montana Central Railway Company, which is a corporation and the plaintiff in the above-entitled action; that affiant makes this verification for the reason that all the officers of said plaintiff corporation are absent from said Silver Bow county, where affiant resides, and where this action is brought, and that affiant has read the foregoing replication and knows the contents thereof, and that the facts therein stated are true to affiant's best knowledge, information and belief.

W. W. DIXON.

Subscribed and sworn to before me this 8th day of November, A. D. 1888.

FRANK E. CORBETT,
Clerk Dist. Ct. Silver Bow Co., Mt. T.

[Endorsed]: Title of Court. Title of Cause. Replication. Filed Nov. 8, 1888. Frank E. Corbett, Clerk. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.—ss.

PLEAS.—At a regular term of the District Court of the Second Judicial District of the State of Montana, sitting in and for the County of Silver Bow, held at the court-house in Butte City, the county seat of the said County of Silver Bow, on the 16th day of July, A. D. 1890.

Present: HON. JOHN J. McHATTON, Judge of the District Court aforesaid.

JOHN T. BALDWIN, ESQ., County Attorney, and

JOHN E. LLOYD, ESQ., Sheriff of said County of Silver Bow, and

WILL L. CLARK, Clerk of said District Court.

The following proceedings, among others, were had, to wit:

MONTANA CENTRAL RY. CO.

vs.

A. F. MIGEON ET AL.

} No. 2093.

Order of Transfer to U. S. Circuit Court.

This day the order heretofore made setting this cause for trial is vacated, and plaintiff's request for transfer of this cause to the United States Circuit Court is granted.

Whereupon, said cause is by the Court ordered trans-

ferred to the United States Circuit Court, 9th District, Montana.

(Signed) JOHN J. McHATTON,
Judge.

THE STATE OF MONTANA,
County of Silver Bow. } ss.

Clerk's Certificate to Transferred Record.

I, WILL L. CLARK, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing is a full, true, and correct copy of order of court transferring the cause of the Montana Central Railway Company versus A. F. Migeon et al., to the United States Circuit Court, 9th District, Montana, made and entered upon the minutes of the said District Court, in Journal F, page 40, on the 16th day of July, A. D. 1890.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 22d day of December, A. D. 1891.

[SEAL]

WILL L. CLARK, Clerk.

[Endorsed]: Title of Court. Title of Cause. Certified copy order of transfer to U. S. Circuit Court. Filed Dec. 24, 1891. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3rd day of April, 1895, an order of court was filed herein, which said order is in the words and figures following, to wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COMPANY,	} Plaintiff,
vs.	
ACHILLE F. MIGEON, BENJAMIN TIBBEY and	} Defendants.
NICHOLAS B. RINGELING,	

**Order Allowing Plaintiff to Adduce Evidence
Orally in Court.**

In this cause, application having been duly made therefor, and on motion of H. G. McIntire and A. J. Shores, solicitors and of counsel for plaintiff, it is ordered that the above-named plaintiff, the Montana Central Railway Company, be, and it is hereby permitted and allowed to adduce its evidence on the final hearing of said cause orally in open court.

Done in open court, April 3rd, 1895.

HIRAM KNOWLES,

Judge.

[Endorsed]: Filed and entered April 3rd, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 17th day of April, 1895, a stipulation was filed herein, which said stipulation is in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-
PANY,

Plaintiff,

vs.

ACHILLE F. MIGEON ET AL,

Defendants.

Stipulation as to Certified Copies of Documents.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action that certified copies of all documents offered as evidence by either party which are on file or recorded in the public records, may be introduced without preliminary proof of the loss or destruction of the originals, saving all legal exceptions as to the authentication, relevancy or materiality of such evidence.

GEO. A. CLARK,

Defendants' Attorney.

H. G. McINTIRE,

Plaintiff's Counsel.

[Endorsed]: Title of Court. Title of Cause. Stipulation. Filed April 17, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on said 17th day of April, 1895, a stipulation was filed herein, which said stipulation is in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-	}
PANY,	
	Plaintiff,
vs.	
ACHILLE F. MIGEON, BENJAMIN TIBBEY	}
and NICHOLAS B. RINGELING,	
Defendants.	

Stipulation as to Proofs, etc.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action, that the lots and parcels of land set out and described in the complaint herein, are situated within the exterior boundaries of mineral entry No. 511; that said mineral entry No. 511 is and was for certain placer mining ground situated near the city of Butte, in Silver Bow county, State of Montana; that application for patent to said mineral entry No. 511 was made and filed in the United States Land Office at Helena, Montana, which was the proper land office therefor, on the 17th day of December, 1878; that afterwards and on the 14th day of July, 1879, in pursuance of law, such application was allowed and final entry made of the lands embraced in such mineral entry No. 511, as placer mining ground, by the applicant, John Noyes; that thereafter a United States

patent for such mineral entry No. 511 was issued and delivered by the proper authorities to said John Noyes, which patent is dated July 28, 1880, and which was on August 25, 1880, duly recorded in the office of the County Clerk and Recorder of Deer Lodge county, which at that date included said Silver Bow county; that afterwards said John Noyes conveyed by deed portions of said mineral entry No. 511 to David N. Upton and James W. Forbis; and that by deed dated the 25th day of July 1887, said John Noyes, David N. Upton and James W. Forbis, together with their wives, in consideration of \$7,314.00 conveyed certain premises including the premises in controversy herein, and which are set out and described in the complaint herein, to the Montana Central Railway Company, which last-mentioned deed was and is recorded in the office of the County Clerk of said Silver Bow county, in Book "L" of Deeds, on page 314; that no conveyance of said premises has been made by said Montana Central Railway Company.

And it is further stipulated and agreed that the Montana Central Railway Company is a corporation organized under the laws of Montana; that it owns and operates a line of railroad from the city of Helena to the city of Butte, in Montana; that a portion of its tracks, buildings and appliances are situated and located upon the said premises in controversy herein, and that the same have been and now are constantly used by said railway company in and about its business and operations.

And it is further stipulated and agreed that no fur-

ther or other proof of the above-stated facts than this stipulation shall be required upon the trial of said cause.

Dated April 10th, 1895.

H. G. McINTIRE,
Plaintiff's Attorney.

GEO. A. CLARK,
Defendants' Attorney.

[Endorsed]: Title of Court. Title of Cause. Stipulation as to Plaintiff's proof. Filed April 17, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on said 17th day of April, 1895, a stipulation was filed herein, which said stipulation is in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-
PANY,

vs.

A. F. MIGEON, ET AL.,

Complainant,

Defendants.

**Stipulation that Evidence be Allowed Orally or
by Deposition.**

It is hereby stipulated and agreed that upon the trial and final hearing of the above-entitled action, either

party thereto may adduce his testimony orally in open court or by deposition, or both.

Dated April 6, 1895.

H. G. McINTIRE,
Complainant's Attorney.
GEO. A. CLARK,
Defendant's Attorney.

[Endorsed]: Title of Court. Title of Cause. Stipulation. Filed April 17, 1895. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th of April, 1895, the following proceedings were had and entered of record herein in the words and figures as follows, to wit:

[TITLE OF COURT AND CAUSE.]

Order Setting Cause for Hearing.

Ordered that this cause be set for hearing Tuesday, April 30th, 1895, at 10 A. M.

And thereafter, to wit, on the 30th day of April, 1895, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

[TITLE OF COURT AND CAUSE.]

Trial.

This cause, heretofore set for hearing this day, came on regularly for trial, A. J. Shores and H. G. McIntire, Esq., appearing as solicitors and counsel for the com-

plainant, and Geo. A. Clark, Esq., appearing as solicitor and of counsel for the defendants, and thereupon map of premises offered in evidence, and certified copy of patent, and thereupon depositions taken in said cause, on motion of counsel for defendants, ordered opened and published, and the same hereby are published, and thereupon John Gillie, P. M. Collins, James A. Murray, Charles Colbert, W. P. Forbis, E. Sticht, D. Linn, W. P. Emery, and Benj. Tibbey, sworn and examined as witnesses on behalf of the defendants, and certain exhibits filed, and thereupon defendants rested, and thereupon further trial of cause ordered continued until May 1, 1895, at 9.30 A. M.

And thereafter, to wit, and the first day of May, 1895, the following further proceedings were had and entered of record herem in the words and figures following to wit:

[TITLE OF COURT AND CAUSE.]

Trial—Continued.

Council for respective parties present as before and trial of cause resumed, and thereupon J. T. Barker, John Noyes, — Palmer, L. S. Scott, A. W. Noden, D. G. Brown, J. McLaggin, — Garlock, W. F. Cobban, R. J. Moffatt and C. H. Hand, were sworn and examined as witnesses on part of the complainant, and thereupon complainant rests, and evidence being closed, argument of cause ordered continued until May 2, 1895, at 9:30 A. M.

And thereafter, to wit, on the 2d day of May, 1895, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

[TITLE OF COURT AND CAUSE.]

Trial—Continued.

Counsel for respective parties present as before, and after argument of counsel cause submitted to the court for consideration and decision thereon.

The depositions, as published in said cause, and the testimony taken on trial of said cause, being as follows:

Sealed and directed by me and delivered to George W. Sproule, Clerk of the Circuit Court of the Ninth Judicial District of the United States in and for the District of Montana, at Butte, Silver Bow county, Montana, this 19th day of March, A. D. 1895.

CHARLES F. ROE,

Notary Public, Silver Bow county, Montana.

Opened, published and filed April 30, 1895. Geo. W. Sproule, Clerk.

Q. How long have you lived in this county—Silver Bow county?

A. Since the fore part of July, 1866.

Q. And have you resided in this county of Silver Bow ever since 1866?

A. All the time. It is my home since 1866—Butte City.

Q. And where is your home located now? What part of town do you live in?

A. I live in the southeast portion of this town, between here and the Parrot smelter.

Q. State whether it is anywhere near the passenger depot of the Montana Central Railway?

A. Right between the Northern Pacific switching ground and the Montana Central switching ground. I live right there. I have been living there since 1877.

Q. You say you were living there in 1877, or about that year?

A. About that year I moved from the main street over there. I was living on main street here before that time.

Q. And that is the place where you are living at the present time?

A. That is the place where I am living at present yes, sir.

Q. Now in the year 1877 or about that time were you engaged in the business of mining in that locality?

A. Yes, sir.

Q. What kind of mining were you following at that time?

A. Placer mining.

Q. Can you describe or give an idea of the locality

where you were conducting your placer mining operations at about that time?

A. Yes, sir, about a half a mile west of the Parrot smelter—where the Parrot smelter is now—a little north. About half a mile from the Parrot smelter west of a little north. I was located at placer mining at that time.

Q. Where was the point where you were conducting these placer operations at that time situated with reference to the present location of the Montana Central passenger depot?

A. South of it.

Q. Will you give us an idea about how far south of it?

A. Why there is one switch built there since. I would say about 300 feet south from the first location of the Montana Central.

Q. Do you know of a location in the vicinity of this place where you were conducting these placer mining operations known as the Parrot gulch?

A. Yes, sir. I had bought all my property, or a good deal of it—8000 by 200 feet—once in the vicinity of the Parrot gulch; that was what I bought under the local law at that time.

Q. In what direction does the Parrot gulch run?

A. North and south, very nearly.

Q. Can you give us an idea of how deep it is?

A. That is hard to say. It is just about from one foot, you might say, to 25 feet deep.

A. State whether or not that gulch was in existence there at or about the year 1877?

A. Yes, sir, it was.

Q. And does the Parrot gulch still exist in that locality in substantially the same condition that it did in the year 1877? A. Yes, sir.

Q. Where was this point at which you were conducting your placer operations in 1877 located with reference to the Parrot gulch?

A. My placer was on both sides of the Parrot gulch, 200 feet east and 200 feet west, and sometimes—what I bought 400 feet west and 400 feet east. That is what we called the Bar claim.

Q. While you were working upon your placer ground in the year 1877, at or near the locality which you have described, state whether you made a discovery of a vein or lead of quartz? A. Yes, sir.

Q. Will you please state, as nearly as you can recall them, the circumstances of that discovery?

A. I will state that I ran a big cut to my ground to cut into my ground—a big cut about eight or nine feet deep I dug into my ground. My ground commenced about 150 feet from this point what we mentioned.

Q. You mean the Parrot gulch?

A. On the Parrot gulch. I dug the ditch into my ground. On the upper end it was some eight feet deep, and on the lower end I just run it into the Silver Bow creek. I dug that with a pick and shovel, and then at once I commenced to piping. I had a pipe, and I then opened my ground with that.

Q. Well, you say you discovered at that point a vein of quartz. Won't you describe the circumstances of that discovery of that vein?

A. Yes, sir. When I run a cut there about 20 feet

wide, I discovered a vein there about 18 inches wide of green ore—six inches on the foot wall, and this ore what they call kind of brown ore, six inches, and 2 feet on the foot wall—which I left standing there when I sunk this shaft there. I made a location on that——

Q. (Interrupting.) Just before you describe your location——

A. (Interrupting.) I made the location—I uncovered this ore.

Q. You say you uncovered. At about what depth below the surface?

A. From one foot to five feet. You see it was a kind of little swag in there; the bed rock was low in there, and the bed rock rose up towards the top very near a foot on both sides. It just happened so I run in there in that swag there, in order to open my ground, you understand.

Q. Was it the color of the quartz which attracted your attention to the lead? A. Yes, sir, of course.

Q. It was the color of it?

A. That is the green ore.

Q. What was the width of that body of green quartz or green ore, as you recollect it?

A. I would say about four or five feet.

Q. At the point where you first noticed this vein do you recollect whether you saw a well defined wall?

A. Yes, sir, a granite wall.

Q. Could you and did you trace the direction of the vein? A. Yes, sir.

Q. And what was its direction?

A. I sunk another shaft.

Q. (Interrupting.) Well, just a moment. At the time you first discovered it could you trace the direction of the vein?

A. I could not say that for certain. You see, sometimes I could trace this—I thought I could trace it for about 200 feet west. There was more of this quartz, boulders on the top than there ought to be—and sometimes you will have them—our best pay streaks in this town here is, you will see that some comes in sometimes north and south. This was east and west. You see you could not exactly go on that. I sunk right on that ore when I sunk west this time.

Q. Where was this point at which you discovered this vein with reference to the Parrot gulch, as nearly as you can tell it?

A. That is about 150 feet west of the gulch.

Q. Do you remember the date upon which you discovered that vein?

A. Yes. This was along—I believe that was on the 2nd day of July, 1877, when I made a location on it. I would not be exactly positive to the date, it is so long ago. I believe that was the 2nd day of July.

Q. The 2nd day of July in what year? A. 1877.

Q. Then on the 2nd day of July, 1877, you made a location upon that vein?

A. Yes, sir. In a day or two within the second day of July, 1877, I made a location. I would not be certain as to the exact day.

Q. Did you locate a quartz claim there at that time?

A. Yes, sir.

Q. Do you remember what you called it?

A. Yes, sir.

Q. What did you call it? A. The Morning Star.

Q. Please look at that paper. (Counsel hands witness a paper.)

A. This paper is my location notice.

Q. At the time you made the location of the Morning Star lode claim, Mr. Colbert, which time you say was on or about the 2nd day of July, 1877, what did you do to make that location?

A. I will tell you. I had a location notice wrote out already, and I ain't sure whether that was my first location notice, on the quartz claim you understand, and then I went up town and showed this location notice to a man here by the name of Judge Wiles, and he says—

Q. (Interrupting). Never mind what he said. Just please tell us as nearly as you can remember exactly what acts you did to make this quartz location which you say you made. Don't tell us any conversation you had with anybody in regard to your location notice, but tell us what you did on the ground.

A. I took this gentleman along that I had showed him my location notice what I had wrote out, and he says—

Q. Never mind about that. You made a location notice did you?

A. That is what I did and I went up and showed it to another man.

Q. Did you sign that location notice?

A. Yes, sir.

Q. Did you swear to it before some official?

A. Yes, sir, Justice of the Peace.

Q. Do you remember his name? A. Yes, sir.

Q. What was his name? A. Judge Wiles.

Q. After you had signed and acknowledged this location notice what did you do with it?

A. I gave this man ten dollars to send it over to Deer Lodge to get it recorded, and I got a statement of it afterwards.

Q. State whether or not you posted a notice of any kind upon the ground. A. Yes, sir, I did.

Q. Whereabouts upon the ground did you post it?

A. Right on the discovery shaft.

Q. At the point where you had first discovered this vein? A. Yes, sir.

Q. And to what did you attach it?

A. 550 feet west.

Q. (Interrupting.) No, what did you put it upon? Did you put it upon a board or some other thing?

A. I had a box there. I nailed the box together and nailed it on the box right on the discovery shaft, on the east side of the discovery shaft.

Q. What was the nature of that notice you put on the box? Was it a copy of the notice you sent to Deer Lodge, or what?

A. Exactly; just exactly a copy of what I sent to Deer Lodge.

Q. How many feet east and west of the point of discovery did you make your location?

A. 750 feet east and 750 feet west from the center of the discovery shaft.

Q. And how wide? A. 600 feet.

Q. Did you ever erect any corner posts to mark the corners of that claim? A. Yes, sir.

Q. About when did you place them?

A. That same time when I made the discovery—when I put a notice on the discovery shaft. I had a man by the name of Hoffman (I had to walk on crutches), and I had him to step it off for me; this was a man by the name of Hoffman, who worked for me.

Q. Were you with him at the time he paced it off?

A. Yes, sir.

Q. What did you do then?

A. I put on the southwest corner "No. 1."

Q. On what?

A. On the Morning Star; on the location of the Morning Star, and on the northwest corner I put "No. 2" on it; on the northeast corner I put "No. 3" on it; and on the southeast corner I put "No. 4" on it; all on the Morning Star. There was about 2 or 3 feet scantlings 2 by 4, and I had about 2 feet above the surface.

Q. These scantlings you have described marked the four corners of your Morning Star claim?

A. Yes, sir.

Q. Now after you had located your claim as you have just stated, describe what work you did upon it, if any?

A. I sunk the discovery shaft in 1877. I sunk before Christmas or before the first day of January. I sunk it about 14 feet—between 14 and 16 feet deep from the surface, and there is about 10 feet in solid rock I sunk there.

Q. And how wide was this discovery hole that you made before the 1st of January?

A. On top I took plenty—worked out there—on top, you see, was paying ground. You see what I worked out on the surface when placering, you understand, was about 20 feet wide. It was what I worked in there, and I cleaned it up for placer.

Q. Just look at that paper, Mr. Colbert (handing witness a paper). Did you ever see that handwriting before? A. Yes, sir.

Q. Whose handwriting is that?

A. That is mine.

Q. You recognize it as yours, do you?

A. Yes, sir; that is my handwriting.

Q. Now just look over that whole paper.

A. That is my handwriting; that is my location notice exactly.

Q. You recognize it, do you?

A. That is my location notice exactly; yes, sir.

Q. You looked at the back of it, did you?

A. That is all right. That is my location notice exactly. That is the way I posted it in the box.

Q. That is the notice you sent to the Recorder's office to be recorded?

A. Yes, sir, in Deer Lodge. I may state it is recorded in Deer Lodge.

Q. State whether it was a copy of this notice that you attached to the box which you described at the point of your discovery shaft? A. Yes, sir.

Q. You attached a copy of this notice?

A. A copy of that notice is what I attached to that box that I described a little while ago.

Q. And this is the copy which you sent?

A. (Interrupting.) Which I sent to Deer Lodge, yes, sir.

The original location notice of the Morning Star quartz lode claim offered in evidence by the defendants and marked Exhibit "A" and made a part of this deposition.

Exhibit "A."

"Morning Star" lode claim, Summit Valley mining district, Deer Lodge county, Montana Territory.

Notice is hereby given that the undersigned has this 2d day of July, A. D. 1877, located fifteen hundred feet in length, and six hundred feet in width on the above-named quartz lode mining claim, bearing gold, silver and other metals, situated in the mining district, county and territory aforesaid, together with all mineral being contained within the following described metes and bounds, to-wit: beginning at discovery shaft, thence running easterly along said lode seven hundred and fifty feet, and westerly from discovery shaft along said lode seven hundred and fifty feet. The discovery shaft on said lode is about one mile southeast of Butte, and in and near the mouth of Parrot gulch, or where the same empties into Silver Bow creek. The said claim comprises seven hundred and fifty feet in an easterly direction and seven hundred and fifty feet in a westerly direction from the center of discovery shaft, including three hundred feet in width on each side of the center of said lode; the corners

of said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced.

A copy of this notice was posted at the discovery shaft on said lode on the 2d day of July, A. D. 1877.

CHARLES COLBERT.

TERRITORY OF MONTANA, }
County of Deer Lodge. } ss.

On this 2d day of July, A. D. 1877, before me, the undersigned, a justice of the peace, in and for said county, personally appeared Charles Colbert, who, being first duly sworn on oath, says that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed, is a true copy of the original notice of location of the claim above described, as posted thereon on the day therein stated.

CHARLES COLBERT.

Subscribed and sworn to before me on the day and year last above written.

ROBERT WILY,

Justice of the Peace.

[Endorsed]: Filed for record July 2d, A. D. 1877, at 8 o'clock P. M., and recorded in book J of lodes, at page 92, Records of Deer Lodge county, M. T. H. S. Clark, County Recorder. Fees \$3.00 paid. Morning Star Lode Summit Valley Dist.

The plaintiff objects to the admission in evidence of this location notice because same is not verified as required by law, nor is it competent to prove any of the issues pending in the present controversy, and it is incompetent, irrelevant and immaterial.

Q. You say, Mr. Colbert, between the time you discovered this vein, located it, in 1877, and about the first of December, 1877, you sunk a discovery hole from about 14 to 16 feet in depth. Do you remember about how many days you worked in sinking that discovery hole to that depth?

A. I cannot say that for certain, how many days. I ain't positive.

Q. Do you remember what the formation was?

A. Yes, sir. I sunk a shaft about between 14 and 16 feet deep from the surface, and I took and I sunk a shaft about 7 feet long east and west, by 4 feet north and south.

Q. Well, was that in 1877?

A. That was in the fall of 1877.

Q. Was that in addition to this discovery hole that you first spoke of?

A. That is the same. When I made the discovery I sunk just about 6 feet deep, I think, and then I made a discovery. Then afterwards when I was through placer mining then I went in there and sunk it deeper.

Q. Did you do any other work in the year 1877 in addition to sinking this 16 foot discovery hole?

A. In 1878 I sunk a shaft.

Q. No, in 1877 did you do any other work?

A. Yes, I started another shaft about 75 feet west— from 75 feet to 100 feet west.

Q. West of what?

A. West of the discovery shaft.

Q. How soon after the discovery did you start that second shaft?

A. About in a month or two afterwards. Just in 1877 I started that. I started both shafts there in 1877.

Q. How deep did you sink the second shaft in the year 1877? A. About 8 feet deep.

Q. State whether or not you discovered in that second shaft that you uncovered, a quartz vein?

A. Yes, sir, I sunk it—

Q. (Interrupting.) What was its width and appearance? Describe it as nearly as you can.

A. That was not quite so big as this one at the discovery shaft. That was about 3 feet—I will say 3 feet, the lead matter was in there.

Q. About how wide was that vein if you remember at that point? A. About 4 feet.

Q. What was the appearance of the matter which it contained, the quartz? What was its color?

A. It was a brown color. When I got into eight feet then it commenced a green color. It was just exactly like the discovery shaft on the top.

Q. Between the first discovery shaft and this second one, state whether or not there were any croppings or indications upon the surface which would show to you the direction of the vein?

The plaintiff objects to the question as being leading. Question withdrawn.

Q. State the reason that you had, if you had any reason, for sinking a second shaft as you stated you did, 75 feet, or about 75 feet, west of the first one?

The plaintiff objects to the witness stating any reason for his actions.

A. I saw at the discovery shaft that the vein run east and west and then I knew exactly very near about 75 feet where I had to sink and I would strike the lead there, you understand, and I did that and I struck right on to it when I sunk 75 feet west of the discovery.

Q. Now then, in addition to the work you say you did upon the claim, did you do any further work, and if so, state what it was?

A. Then I sunk them both shafts, that west shaft I sunk about 10 feet deep and then I had three feet of green ore in it and I sunk the discovery shaft to about 14 feet—between 14 and 15 feet deep from the surface, I will say. That is from the surface and not in the bed rock, but just about 11 feet in the bed rock, what I call bed rock, granite bed rock.

Q. How long did you hold that claim, or work it?

A. I sold the claim, and I would not be certain whether I did so in April of 1879 or April of 1880—I would not be exactly certain of that, it is so long ago—then I sold it all.

Q. Did you hold it during the year 1877?

A. Yes, sir.

Q. Did you hold it during the year 1878?

A. In the year 1878 I held it. I would not be exactly certain when I sold it, whether it was in April 1879 or 1880.

Q. Whenever it was, what disposition did you make of it at that time?

A. I sold it to a man by the name of Valentine Kropf.

Q. During the time that you say you held the claim,

state whether or not you took any ore matter out of these shafts that you sunk? A. Yes, sir.

Q. Will you give us an idea of how much you took out?

A. I just sampled it. I just took a little piece from here and there in the shaft, and then I gave it to a gentleman by the name of Frelig Bridenbutcher, and I would not be certain whether that was in the fall of 1877 in November, or December of the fall of 1878, in November or December. I would not be exactly certain. I could not work very well. I had just come out of the hospital, and I had to walk with one crutch yet.

Q. In sinking the shafts, what did you do with the vein matter that you took out?

A. I put it on the dump—two dumps I had there.

Q. Can you not give us an idea of about how much you took out and left on the dump?

A. Yes, sir. I should say about 10 tons.

Q. Was it all on the dump at the first shaft, the original discovery shaft or on the second one?

A. On both of them.

Q. About 10 tons altogether?

A. Yes, sir, but it may be more, or a little less, but I will say just 10 tons.

Q. Did you ever have an assay made of any of the ore samples which you took from either shaft?

A. Yes, sir.

Q. Well, who assayed it?

A. Mayers. I sent it up to Mr. Mayers here on West Park street.

Q. By whom did you send it up, if you remember?

A. Frelig Bridenbutcher.

Q. Do you know where this Bridenbutcher is now?

A. No, he is dead.

Q. Can you give us any idea of the time, the date upon which you sent this sample up to this assayer?

A. That was the 22nd of November or 22nd of December in 1877 or 1878; I would not be exactly positive. I believe that was in 1878. I will say 1878.

Q. Did you get at that time, or have you now, Mr. Colbert, any report of that assay?

A. No, sir. When I sold out to Mr. Valentine Kropf I gave him that certificate.

Q. Then you did get a certificate?

A. Yes, sir, he gave me a certificate.

Q. Who brought you this certificate?

A. Mr. Bridenbutcher.

Q. The same man with whom who sent the samples?

A. Yes, sir.

Q. You submitted the sample to the assayer and you got a return, did you?

A. Yes, sir, and that certificate I gave to Kropf.

Q. Describe once more, as nearly as you can, the appearance of the ore which you took of these shafts, or the quartz which you took out of these shafts?

A. There was some about 18 inches green ore, and then I had to take that brown ore out to make a shaft four feet wide north and south, and about 7 feet east and west.

Q. What was the color of this green ore that you speak of particularly—was it vivid green or just a trace of greenish color?

A. No, it was green ore. I will state that was the best——

Q. (Interrupting.) You have been, you say, engaged in mining all your life, haven't you?

A. No, since 1863.

Q. Well, since 1863. What, as a miner who has been following that occupation since 1863, would you say this green appearance of that quartz you took out indicate to you?

A. It was plain that there was a fortune there for me to locate that ground.

Q. What would it indicate to you as a man who had been following the mining business a good many years, with reference to whether the quartz did or did not contain any mineral?

A. Of course, that would show me plain that it contained mineral.

Q. What kind of mineral, do you know?

A. Copper, silver and gold. That is the reason I got it assayed for them. I wanted to know exactly what was in it. Three articles I got assayed by Mayers.

Q. Now, as to the weight of any of this quartz matter that you took out. State whether it was comparatively light or comparatively heavy.

A. It was heavy; this green ore was heavy.

Q. Would the comparative heavy weight of quartz indicate to you, as a mining man, the presence or absence of mineral in it?

A. Yes, sir, of course.

Q. Which, the presence or the absence of mineral?

A. The presence.

Q. Do you remember, Mr. Colbert, whether, while you were working at either of these discovery shafts, anybody ever came there with whom you talked about what you were doing and the nature of the work that you were engaged at?

A. Yes, sir. Two gentlemen came—Mr. Bernard. I had to buy water from him. He came right there one day and I was working on this shaft then.

Q. Which one, the first one or the second one?

A. The second one—the west one—and I told him when he would allow me so much for what was lead there, I would sell it for water money to him.

Q. Sell him what?

A. Sell him the quartz. That was Mr. Bernard—
A. W. Bernard. I showed him the ledge there.

Q. You showed what you called the ledge to Mr. Bernard, did you?

A. Yes, sir, and he took out his handkerchief and he took a sample of the dump, and he took it away.

Q. Did you ever show the ledge to anybody else?

A. Yes, sir, to Mr. Noyes.

Q. Did Mr. Noyes come there? A. Yes, sir.

Q. Did you show him this ledge?

A. Yes, and I made him the same proposition I had made to Mr. Bernard. Mr. Noyes and Mr. Bernard, they owned the water ditch, and I had to buy water from them.

Q. What Noyes was that? A. John Noyes, the fellow that owned the placer. He owned the water, and I had to buy water from these two gentlemen.

Q. Do you remember what year it was that you saw these two men there, Mr. Bernard and Mr. Noyes?

A. Mr. Bernard was there, I will state positively, in 1878, and then I would not be sure what Mr. Noyes— between 1878 and 1880, when Mr. Noyes was there, I would not be sure what year. Mr. Noyes was there somewhere between 1877 and 1880, and Mr. Bernard was there in 1878. I will state of that I am positive of it.

Q. Did you have any conversation with Mr. Noyes?

A. Yes, sir.

Q. Now, you can state what that was?

A. Just that same.

Q. State what conversation you had there with him?

A. Just the same. He told me, "Charley," he called me Charley. He said, "This is no claim for a poor man. There is too much water here." That is what he answered me. "There is too much water here," he said right there.

Q. What was that remark made by him responsive to? What had you said?

A. I wanted to sell him that claim right there for so much water money, you understand.

Q. What claim was it you wanted to sell him?

A. The Morning Star.

Q. Is that all the conversation, as nearly as you can recollect it between you and Mr. Noyes?

A. Yes, that is all the conversation; there was too much water.

Q. Did you ever show this ledge to George Newkirk?

A. Yes, sir. Mr. Newkirk came down there. He tried to relocate it once, and another gentleman by the name of Scotty, I believe, I would not be certain, now.

Q. Do you recollect whether or not you ever showed that ledge to Mr. Emery, W. P. Emery?

A. Yes, sir, I showed it to Mr. Emery; him and me was neighbors; we was living close together and he would come over very nearly every day and see me when I was placer mining and when I was working on the quartz, too.

Q. And he would come over almost every day?

A. Very nearly, yes, sir.

Q. Do you remember whether you ever showed that ledge to George H. Tong?

A. Yes, sir, I showed it to Mr. Tong, too. We was all neighbors there for a good many years, me, Mr. Tong and Mr. Emery. I was the furthest west and they were the furthest east there, Mr. Tong and Mr. Emery.

Q. Can you remember whether you ever showed it to Mr. Tong, or he ever saw it, was on the ground there?

A. In the year 1877, I believe so, yes.

Q. Do you remember whether you ever showed the ledge to Valentine Kropf?

A. Yes. I didn't show it to him. When he wanted to buy me out I sold it to him. I don't recollect that I showed it to him. He was around the country all the time and he had seen it before he bought me out.

Q. Mr. Colbert, you say you have been living at the place where you live at present since about 1877?

A. Yes, sir.

Q. State whether you know of a quartz claim in that vicinity called the "Childe Harold" quartz lode claim?

A. Yes, sir.

Q. About where is it situated with reference to your place of residence?

A. I should say that is about 800 feet due south a little of east; 800 feet of my house, where I have lived since 1877, a little bit east of south.

Q. About where does the "Childe Harold" claim lie with reference to the Parrot gulch, of which you have spoken? A. West of it.

Q. And about how far west?

A. 150 feet, maybe 200. I would not say exactly. I have not measured it exactly.

Q. About where does this "Childe Harold" claim lie with reference to the Montana Railroad's, Montana Central Railroad's passenger depot?

A. The first six tracks they had it was about between 200 and 300 feet; the discovery shaft I mean—between 200 and 300 feet.

Q. About 200 or 300 feet from it in what direction?

A. South, that is south of this switch depot.

Q. Now, do you know whether there is any discovery shaft, or discovery excavation upon the "Childe Harold" claim?

A. Yes, sir, that is timbered since I left it.

Q. Can you describe where that shaft is located?

A. Yes, sir, that is exactly located in that same—

Q. Well, no, but how is it located with reference to the Parrot gulch, that you spoke of?

A. That is all west of it. That runs clean in. The

discovery shaft is in 10 feet, from 10 to 20 or 25 feet on the eastern line.

Q. From ten to 25 feet of the eastern line of the "Childe Harold"? A. Yes, sir.

Q. Have you seen that shaft lately?

A. No, not since last fall.

Q. Describe it as you saw it last fall, as nearly as you can. Is it a hole in the ground or is it timbered, or what?

A. That is timbered up to the top about that high (indicating) between three and four feet high above the surface there.

Q. Did you ever look into it when you were there last fall? A. No, I haven't looked into it.

Q. Then you cannot state what its depth is?

A. No, sir, I could not. Since I left there several parties have worked in there and I could not say what the depth is.

Q. Can you see the discovery shaft, this discovery shaft that you are now speaking of, upon the "Childe Harold" claim, from your house?

A. Yes, sir, except when them big box cars are on the Montana Central Railroad; when they are gone then I can see it from my north—from my south window I can see it.

Q. To the best of your recollection how long has that shaft been there?

A. That shaft has been there since—so soon as I made the location notice on it I had the 16 foot shaft sunk on it, and I made a location notice on it in 1877.

Q. Can you state whether the present discovery

shaft upon the "Childe Harold" is or is not in the same place where you originally made the discovery of the Morning Star quartz lode claim, and sunk your discovery shaft?

A. Yes, sir, at that same place. I seen the notice on it.

Q. Do you remember when you saw that notice?

A. I believe that was in 1882. I believe I saw a new notice on it then. There were several men wanted to jump it.

Q. Never mind about that. Where was that notice when you saw it?

A. It was on the discovery shaft there where I had my discovery notice.

Q. And you have lived at your present place of residence ever since 1877? A. Yes, sir.

Q. And you can see from your house, you say, when these cars are away, this ground?

A. Very near every foot of it when those box-cars are away.

Q. Did you ever see the corners of the "Childe Harold?" A. Yes, sir.

Q. Who showed them to you?

A. I seen Mr. Ringeling surveying the corners of it.

Q. Did you ever see them before that?

A. I seen them before that, yes, sir.

Q. Mr. Colbert, at the time you located, as you have stated, the Morning Star lode, did you have at that time, or had you prior to that time filed upon that same ground covered by the Morning Star lode a notice of a placer location? A. No, sir.

Q. You had not?

A. That was government land at the time.

Q. State whether you recollect ever having seen any boundaries marking the "Childe Harold" quartz location?

A. Yes.

Q. Now tell us when you saw them, as nearly as you can, the first time. Tell us, also, what they were.

A. I know of three corner posts in 1882. McKinstry was the locator of that claim.

Q. How many boundaries did you see on that claim?

A. I seen three. They were the southeast, the southwest and the northeast. Those three I saw. I didn't see the northwest.

Q. Those three boundaries that you say you saw, what were they?

A. I could not tell you. The location notice—

Q. (Interrupting.) I mean the boundaries that you saw.

A. That was a location of a quartz claim, and I could not say exactly what claim that was after me.

Q. You cannot recollect whether these marks were boundary marks or not?

A. Yes, I know they were posts. I seen a post mark plain.

Q. What were these posts of, wood or stone, or what?

A. Wood.

Q. Were there any marks upon the posts?

A. They were 2 by 4.

Q. Were there any marks upon the posts?

A. There were marks upon those posts.

Q. About how high were they above the ground?

A. Between 3 and 4 feet high.

Q. Do you remember whether there were any marks upon them?

A. I ain't certain. I seen them putting them there.

Q. Do you recollect whether at any time after you had sold the Morning Star claim to Mr. Kropf, you ever saw anybody upon the ground there, after that time, making a survey? A. Yes, sir.

Q. Can you remember about what time that was?

A. No.

Q. Can you remember who it was that you saw there?

A. Yes, sir.

Q. Who?

A. Mr. Ringeling. Mr. Baker, too. Mr. Baker he was there when we applied for this placer location on this same location.

Q. Did you see either Mr. Ringeling or Mr. Baker set up any marks upon the ground of any kind?

A. Yes, sir.

Q. What were they?

A. They were posts 2 by 4.

Q. Where were these posts which they put up upon the ground located, with reference to the three posts, or boundaries, that you say you saw in 1882 upon the ground?

A. A line from the southeast corner post to the northeast corner post would run east of the discovery shaft, probably about 25 feet—from 10 to 25 feet, I should say.

Q. East of what we call the first discovery?

A. No, on the "Childe Harold," which is east from 10 to 25 feet.

Q. Was that line east of the first discovery shaft that you made, or the "Childe Harold" discovery shaft?

A. That was east, from 10 to 25 feet, of my discovery shaft on the Morning Star.

Q. Now, were these boundaries or posts, which you say you saw Mr. Ringeling and Mr. Baker set up on the ground, were they in the same or different places than the three posts or boundaries which you say you saw there in 1882?

A. No, they were a little more south. The southwest corner was a little more south.

Q. How much southwest would you say?

A. About three hundred feet.

Q. Did you know Harvey McKinstry? A. No.

Q. Never knew him? A. No.

Q. You never saw him that you can recollect, did you? A. No, I just seen the notice, that is all.

Q. You did see the notice? A. Yes.

Q. Can you remember anything contained in that notice?

A. No, I cannot, that is too long ago. I read it, and that is all.

Q. You read it over?

A. I read it over, yes, sir.

Q. Can you remember what name was signed to it?

A. McKinstry.

Q. Do you remember the first name?

A. No, I don't remember the first name.

Q. Can you remember the name of the claim stated in the notice?

A. No, I cannot remember that name.

Q. On how many occasions do you recollect having seen Mr. Ringeling there, or Mr. Baker, in 1882?

A. A good many times I seen Mr. Ringeling surveying this claim, and one time Mr. Ringeling came down to my house, and he had Mr. Johnny Forbis along, and I went with them and showed them the claim.

Q. They came there and wanted you to go with them and show them the claim?

A. Yes, or they wanted me to go with them and see something at the shaft or the discovery, or such a thing.

Q. Did you go down with them? A. Yes, sir.

Q. Where did you go?

A. To the discovery shaft.

Q. The discovery shaft on what?

A. On what he called it, on what they called it. I don't know exactly what they called that claim. I don't know for certain, you know. I went down there with them.

Q. Well, was it the same shaft that they called the "Childe Harold" shaft now, that you went to see that time? A. Yes, sir, the same shaft.

Cross-Examination.

By *Mr. McIntire.* Q. When did you go down there with Mr. Forbis and Mr. Ringeling? What year?

A. That was after 1882.

Q. Can you fix the year any nearer than that?

A. No.

Q. Wasn't it after 1885? A. No, sir.

Q. Did Mr. Ringeling claim to be the owner of that claim then?

A. Yes, sir, Mr. Forbis was his attorney.

Q. Mr. Ringeling claimed to have some interest in that claim, did he? A. Yes, sir.

Q. Don't you know that Mr. Ringeling bought in that claim on June 20th, 1885?

A. I don't know that.

Q. Who else was there with you and Mr. Ringeling on the occasion of your visit to that claim with them?

A. Mr. Forbis.

Q. Anyone else? A. No, sir.

Q. Just you three? A. Yes, sir.

Q. And they came to your cabin to get you to go with them, did they? A. Yes, sir.

Q. What did you go down to the shaft for?

A. They wanted to jump the other location there.

Q. Was that before or after the time you say Mr. Ringeling and Mr. Baker surveyed the ground?

A. That was after.

Q. Did you know what they were making that survey for? A. Yes, sir.

Q. What for?

A. Mr. Ringeling surveyed this claim.

Q. What for, do you know?

A. I don't know for certain what they called this claim.

Q. Didn't you know they were making the survey for the purpose of an application for a patent?

A. I didn't know that.

Q. Then all of this survey was made by Mr. Ringeling and Mr. Baker in 1887?

A. Mr. Baker I didn't see.

Q. Then you must have seen Mr. Forbis and Mr. Ringeling after 1887, must you not?

A. No, I don't think so.

Q. At the time they took you down to the shaft, they simply wanted to show you their location down there?

A. Oh, I knew that location, they just wanted to take me down to show me their stakes, but I seen these stakes before, and I told them so.

Q. Why did they want you to see their stakes?

A. I don't know why they wanted me to see them.

Q. Did they say anything about this lawsuit as being then pending? A. No, nothing at all.

Q. They didn't give any reason at all then for you looking at their stakes and this discovery—you just went down there then for the fun of the thing, is that it?

A. I don't know exactly what they wanted me for—I don't know nothing about it.

Q. Did Mr. Ringeling pay you anything to go down there? A. No, sir.

Q. How far was that from your house?

A. About eight hundred feet south, probably twelve hundred feet.

Q. From your house?

A. South, and a little of east.

Q. Was the ground pretty rough between this discovery shaft and your house?

A. No, it was pretty level.

Q. Did you have to cross the railroad track to get there?

A. No, sir, we didn't have any railroad there then.

Q. That was before the railroad came down there then was it? A. Yes, sir.

Q. How long before the railroad came there?

A. I can't say exactly.

Q. Was it any before the railroad came there?

A. Oh, maybe two or three years.

Q. You are not certain of that—when that was?

A. No, sir.

Q. The ground between your house and this shaft was pretty rough placer ground, wasn't it?

A. No, sir, it was smooth ground east and west, it was worked out, and right south of me and my cabin it was smooth ground.

Q. Was not all that ground around there, except that which has been built up by railroad, pretty rough ground, cut by little gullies and holes, and so on?

A. Yes, sir.

Q. Wasn't that so when you went down there with Mr. Ringeling and Mr. Forbis? A. No, sir.

Q. Was there a roadway or pathway at that time from your house to the shaft?

A. There was always a little pathway.

Q. You went on this road did you to the shaft?

A. Yes, sir.

Q. How long did you stay there at that time, at the time you went there with Mr. Forbis and Mr. Ringeling?

A. I would say that fifteen minutes was the longest.

Q. And you say you went to the discovery shaft?

A. Yes, sir.

Q. Did you look into the discovery shaft then?

A. Yes.

Q. How big was it at that time?

A. I couldn't tell, at that time they had worked there for me.

Q. Was it timbered then?

A. Not timbered then.

Q. Was there any hoisting frame over the shaft at that time? A. No, sir.

Q. It was nothing but a hole in the ground?

A. That is all, a good hole in the ground.

Q. How big was that hole; how wide was it and how long? A. What I sunk there was four feet wide.

Q. Now, before this, when you went there with Mr. Forbis and Mr. Ringeling, how big was the hole then?

A. I cannot say for certain, I cannot state exactly how big it was at that time.

Q. How big was it, how wide and how long?

A. Oh, it was about six or seven feet— (Question interrupted.)

Q. And how wide? (Continuation of answer.)

A. East and west, and four feet north and south.

Q. It was that size then, was it, when you went there with Mr. Ringeling and Mr. Forbis to see it?

A. Well, I would fix it at that.

Q. Did you see the bottom of the shaft at all?

A. No.

Q. Was the wall of the shaft smooth, or had it caved in at all?

A. I couldn't say exactly, I know when I sunk that shaft—

Q. Never mind about when you sunk it, I want to know how it was when you were there with Mr. Forbis and Mr. Ringeling—was it caved in any then, or was it a clean cut shaft? A. It was clean cut shaft.

Q. What was the material there through which that shaft was dug—the material around the surface of the ground, was it earth or rock? A. It was rock.

Q. Was it rock right at the surface?

A. It couldn't be nothing else than rock.

Q. Was it rock at the surface?

A. Yes; I had a dump there, and when I dug that shaft there I had a dump—about five or six loads of nice ore there.

Q. I do not think you understand me; I am referring to the material around the shaft, around the hole and in the dump; was that shaft sunk in rock, or was it sunk in loose dirt?

A. That was sunk in rock, rock right there at the surface of the ground.

Q. Rock right from the surface of the ground?

A. No, not from the surface; there was from one foot to five feet surface; I ran in there with my flume from my placer claim.

Q. Now confine yourself to the time you went there with Mr. Ringeling and Mr. Forbis?

A. Oh, then, that was rock from the surface, when they went down in my shaft.

Q. Now, I say, from that shaft where the shaft came up to the surface of the ground, was that in earth or was it in rock? A. Earth.

Q. How far down was the rock from the surface?

A. One foot to five feet.

Q. Had any of that earth caved in at the time you were there with Mr. Ringeling and Mr. Forbis?

A. No.

Q. Then the shaft was smooth up and down right to the surface of the ground there, sure this earth was there when you saw it with Mr. Ringeling and Mr. Forbis?

A. Now, can I explain that.

Q. Now just answer that question. (Question repeated.) A. It was smooth.

Q. Did you see any other holes around this shaft at the time you went there with Mr. Forbis and Mr. Ringeling? A. Yes.

Q. With reference to this hole you have just described, where was the other hole that you saw, if you saw any?

A. Between seventy-five and a hundred feet west.

Q. West of that hole that you went down to see with them? A. Yes, sir.

Q. Did you go to that hole at that time?

A. Yes, sir.

Q. How deep down was that hole?

A. Ten feet.

Q. Just ten feet deep? A. Yes, sir.

Q. Was that hole timbered up?

A. No, sir, there was not any timber in that hole.

Q. Was it covered over, or did you go down in it?

A. No, there was no covering.

Q. How big a hole was that?

A. That was about the same length as the other was.

Q. Is that the hole you have described in your testimony this morning as the one you dug?

A. Yes, sir.

Q. You dug these two holes, did you?

A. Yes, sir.

Q. Now, you say that you saw some posts at the time that you went there with Mr. Ringeling; with reference to this hole, this first hole that you have described, tell us where these posts were?

A. I told Mr. Ringeling then that I went a little south, a little west, a little south like, and I fixed my posts there before.

Q. What posts did you go to see then on the "Childe Harold" lode?

A. I see the southeast corner, the southwest and the northeast corners, and I told him right there—I told him you got on the brick house, the two-story brick house there on the north side.

Q. You saw these three posts, did you?

A. Yes, sir.

Q. How far from that hole you have described is the northeast post that you visited at the time you and Mr. Ringeling and Mr. Forbis were there?

A. We didn't visit any post at all.

Q. You didn't go to the post at that time?

A. No.

Q. Didn't you just now say you went to that post at that time with them?

A. No, sir, we didn't go to the post, we went just to the discovery shaft.

Q. You didn't go to these posts then?

A. No, I seen them before when Mr. Ringeling surveyed them; I stayed and watched at the frame cabin.

Q. Now when did you first see these three corners?

A. I can't remember exactly.

Q. Well, do you remember the year?

A. That was in '83 or '84.

Q. Do you remember when you went to the north-east corner? A. Yes, I remember.

Q. How far from that discovery hole is that north-east corner? A. Three hundred feet, sure.

Q. And in about what direction?

A. It is close; you know very well where I live.

Q. I do not know anything except what you tell me.

A. You know very well where I live, and then you can think about how far it is.

Q. Answer the question.

A. Now I say this is about three hundred feet from this hole.

Q. Now then, what direction from the hole?

A. It is south of my cabin, about four hundred feet south, and a little of east is the northeast corner stone of this new location.

Q. Now, you say this is about three hundred feet from the hole; what direction is it from that hole?

A. It is east, and a little—exactly about east.

Q. That is the one you call the northeast corner, is it?
A. Yes, sir.

Q. Now, the southwest corner that you say you saw on the "Childe Harold," what distance is that from that discovery hole?
A. Three hundred feet.

Q. What direction from the hole?

A. South, that discovery.

Q. That discovery hole that you spoke of, about three hundred feet, what direction is it?

A. It is south, a little east.

Q. With reference to the posts you had on the ground of your Morning Star, how did these two posts compare?
A. They didn't compare.

Q. Your posts were not anywhere near them were they?

A. No, I ran my claim a little south of east, and a little northwest; he got a little out of the way.

Q. Your claim was seven hundred and fifty feet on each side of this hole wasn't it?
A. Yes.

Q. So these two posts we have been talking about just now would be about the middle of the other claim would they not?
A. Very near.

Q. Did you ever go to the southwest corner of this "Childe Harold" claim?

A. Yes, I seen it plain; I could see that post very plain from my cabin.

Q. Well with reference to the discovery hole, where was that post?

A. I cannot say; it was 1,450 feet west, this post was.

Q. And how near was it to any corner of your Morning Star claim, in that direction?

A. That was on my southwest corner, this post was about between three and four hundred feet south, between my southwest corner of the Morning Star, and the southwest corner of this claim was between three and four hundred feet south.

Q. As a matter of fact it was about seven hundred and fifty feet, wasn't it, south?

A. I don't remember it, exactly.

Q. You are just roughly estimating this distance aren't you?

A. Yes, sir.

Q. Then we are to understand you as saying that the "Childe Harold" does not correspond with the Morning Star, does it?

A. Not exactly.

Q. The only thing on the Morning Star that the "Childe Harold" has is the discovery shaft, isn't it?

A. Yes, sir.

Q. You say that when you were mining this ground in 1887 it was public ground?

A. Yes, sir.

Q. Well, what was that "Bar" claim that you spoke about this morning? Didn't you locate that claim?

A. It is north of this.

Q. Wasn't this Morning Star on what is called the "Bar" claim?

A. No.

Q. Was there any placer workings at all around where this Morning Star was?

A. Not at all, except east of it. Out east there was a fellow by the name of Marsdon, Mr. Emery and Mr. Tong. They had a little placer claim there on the east end of the Morning Star that I located.

Q. So that was called the Emery and Tong placer claim? A. Yes, sir, and Marsdon was there.

Q. You had a half-interest in that claim, didn't you?

A. Not a half.

Q. Well, a large portion of it?

A. Yes, I have some.

Q. You have it still, have you not? A. Yes.

Q. And you are living on a part of that ground?

A. No, there is another claim there, called the Emery placer, that I live on.

Q. What is the Emery placer?

A. Me and Mr. Tong and Mr. Emery. We located about sixty acres.

Q. Now this is east of your Morning Star location, isn't it? A. It is north.

Q. North of the Morning Star?

A. Yes, north.

Q. Do you know the eastern boundary line of the Noyes & Upton placer claim? A. Yes.

Q. How far from this discovery hole is the east line of that Noyes & Upton placer?

A. From ten to twenty-five feet.

Q. That is the east line of the Morning Star discovery, from ten to twenty-five feet? A. Yes, sir.

Q. That would be the east line of the Noyes & Upton placer, you mean? A. Yes, sir.

Q. So that the east line of the "Childe Harold" begins on the east line of the Noyes & Upton placer, does it?

A. No, sir; this discovery claim, you understand

me now, this discovery claim is in that piece of placer what I bought from Mr. Nichols and Marsch.

Q. What discovery do you mean, the Morning Star?

A. No, the placer ground, you understand now? I bought a piece of ground there from Mr. Emery and Mr. Tong and Mr. Marsh; we bought six hundred feet from that placer claim—I can't remember that name——

Q. How far from this hole is this piece of ground that you bought? A. It is right on it.

Q. That was the ground that you worked at that time, in 1887? A. Yes, sir.

Q. Well, you were working placer ground around there at that time, were you not? A. Yes.

Q. Do you know where the east line of the Noyes & Upton placer claim is? A. Yes, sir.

Q. How far from the discovery shaft of this Morning Star, which you say you took in 1877, is the eastern line of the Noyes & Upton placer?

A. From ten to twenty feet, I would not be exactly certain—I never measured it.

Q. Now, half of your claim, half of the Morning Star then was in the Noyes & Upton placer?

A. Very near.

Q. And the other half was off—

A. Not quite half.

Q. And almost all of the "Childe Harold" is on the Noyes & Upton place ground, isn't it?

A. No, sir, there is a portion on my placer claim.

Q. It is on this side? A. Yes, sir.

Q. What portion of it is on this?

A. The discovery shaft.

Q. The discovery shaft is on your ground, is it?

A. Yes, sir.

Q. And is not on the Noyes & Upton placer then?

A. No, sir.

Q. Didn't you say a minute ago that the eastern line of the Noyes & Upton placer was from ten to twenty-five feet east of this discovery shaft?

A. Yes, I meant west of it—west of the discovery.

Q. There is a fence on that ground isn't there?

A. Yes, sir.

Q. Does that fence mark the eastern line of the Noyes & Upton placer? A. Yes, sir.

Q. This eastern line where that fence is is the eastern line of that placer? A. Yes, sir.

Q. Then this discovery is east of that fence, is it?

A. Yes, sir.

Q. And not on the Noyes & Upton ground?

A. No, sir.

Q. When were you last there?

A. Last year somewheres.

Q. In the year 1894? A. Yes, last year.

Q. You have not been there this year, have you?

A. No, sir.

Q. At what time in the year 1894 were you there?

A. I was there a good many times.

Q. Were you down to this hole you spoke of a good many times? A. Yes, sir.

Q. That is quite a little distance from your house, is it not?

A. Yes, it is south from eight hundred to a thousand feet.

Q. What did you go down there for?

A. I had another claim there to bond out, and I showed them people that bonded it how to sink.

Q. And each time that you went down to your claim that you had bonded, did you go to this old hole you had there? A. Yes, sir.

Q. I am referring to this old hole that you had dug there in 1877? A. Yes, sir.

Q. Did you go to see this hole every time you went down there?

A. No, I couldn't do it, I knew it so well.

Q. When did you last go to see that hole?

A. Last year.

Q. At what time last year, in what month?

A. I would not be certain at what time.

Q. Were you alone or with somebody?

A. I went alone.

Q. Why did you go alone?

A. I bonded my claim to a fellow by the name of Evans, and that was the last time I was there.

Q. Is that the reason you went to look at this hole, because you had bonded more ground down there?

A. Yes, sir.

Q. When you saw this hole in 1894, what appearance did it have—was it the same as it was the last time you saw it?

A. Yes, it was covered up, I couldn't look in.

Q. Did it have boards over the top?

A. Yes, sir.

Q. Did it have anything else around it?

A. No. It was just a good shaft there.

Q. Have any frame work over it?

A. No, sir, the framework I had over my own shaft there, was the discovery.

Q. Hasn't that hole down there got a frame over it—a hoisting works? A. No, sir.

Q. Which hole is it down there that has gallows or a frame over it? A. It is my discovery shaft.

Q. That is the hole I am talking about?

A. No, that has not any gallows frame over it, this discovery shaft—what they mean, it is mine—I call this the “Childe Harold Number Two,” and I bonded that, too.

Q. Where is the discovery shaft on the “Childe Harold”? A. It is west of this.

Q. Then this hole with this frame work over it, and is timbered up, is not the discovery shaft of the “Childe Harold”? A. No.

Q. It is the discovery of the “Childe Harold Number Two”?

A. No, not that neither, it is five hundred feet west. I got the discovery shaft of the “Childe Harold Number Two.”

Q. What is that hole then with the frame work around it and the gallows over it?

A. That is what we call the “Green Copper,” and the “Childe Harold Number Two”; there is only one hole around there that is timbered up and has a gallows frame over it—there is just one.

Q. And that is the discovery of the “Green Copper”?

A. The "Green Copper"; and the "Childe Harold Number Two," 6500 feet east, was the "Childe Harold Number Two," that is the discovery shaft of the "Green Copper."

Q. And it has nothing to do with the "Childe Harold" at all? A. Not at all.

Q. Is that the hole you dug there in '87?

A. No, sir.

Q. You didn't have anything to do with that in '87?

A. Not at all, no sir.

Q. When you stopped working that ground down there, how much ore and rock was there on either of these two dumps at these two holes that you spoke of?

A. Anyhow, ten tons.

Q. How big a pile would that make?

A. I cannot say exactly how big a pile that would make: I judged what amount of tons I had there in these two shafts of mine.

Q. Was the ore piled up or was it scattered flat on the ground? A. I had three piles.

Q. Was it piled up or was it scattered out flat on the ground?

A. Scattered; I had another pile there on another shaft there, and I ran the tailings I had there, and there is a big pile of ore yet, I would say there is five wagon-loads there yet, and it is on the north shaft what I ran the tailings on.

Q. When you went down there with Mr. Forbis and Mr. Ringeling, how big was that pile, that big dump?

A. That was filled up.

Q. The pile was filled up how?

A. Yes; you see I had a little swag where I ran in there what I worked for placer claims, you understand, and that ran up to one foot on each side, and when I ran that out, and that was pretty good ground, and then afterwards when I worked on my ground the tailings broke and ran right in there.

Q. Did you cover over the pile of ore that was dug out by you people? A. Yes, sir.

Q. Then there was no dump pile there when you went there with Mr. Forbis and Mr. Ringeling?

A. There was a dump pile there; I threw all my big chunks of ore there when I sunk this shaft—I threw them all on the top of the surface, and anybody will bring me out in that; I put out two feet square chunks sometimes, and I threw them right on that place, the biggest ones, and then smaller pieces I just shoveled them out on to the north side of the shaft.

Q. How near to the hole, south, did you shovel them?

A. Just to the north side of the hole.

Q. When you were last there were these chunks still there?

A. I don't know that is covered over with tailings.

Q. Explain to me how you come to cover the dump pile with tailings, and not fill the hole?

A. That was filled up, it was all filled up, and they relocated it then.

Q. Was it filled up there at the time you went there with Mr. Ringeling and Mr. Forbis?

A. No, they had dug it out.

Q. When did you fill up that hole, what year?

A. '79 I filled up that hole.

Q. Filled up both holes that you had there at that time?

A. No, one, I couldn't fill one up that was way on top of the surface, the west hole, I couldn't fill that up.

Q. How much ore did you say was around these two holes that you have described at the time you visited them in 1894?

A. I can't remember for certain, I can't answer that question, I don't know for certain how much ore there was there in '94.

Q. Was there any at all? A. Yes, sir.

Q. You have no objection to going down there with me some day and showing me these holes have you?

A. No, not at all; I wouldn't have any objections at all.

Q. When did you last work on this placer ground in the neighborhood of these holes you have described?

A. In '79.

Q. In '79?

A. '85, I did my last work there, I ran another cut west of this discovery shaft?

Q. Then you were working on this ground in '85?

A. In '85, yes, that is the last work I did there.

Q. Well this ground all belonged to Noyes & Upton in '85, didn't it? A. I know that.

Q. Did you hire it from them?

A. Yes, sir, they promised me to give me that ground back again; they stole it from me, but they came to time after awhile.

Q. Was that pretty good placer ground?

A. Pretty good, yes.

Q. You made money out of it, didn't you?

A. Yes, north of this location all around there was pretty good placer ground. No, not all around. When I got into my ground what I had located under our local location laws here in the early days we didn't have any surveyors. This ground was all surveyed afterwards, and we had our local location here two years, and that was our local law here; I could hold just four hundred feet, and not any more, except I buy it.

Q. But it was pretty good placer ground, wasn't it?

A. Of course it was pretty good placer ground.

Q. Did you have a partner in with you working that ground, or did you work it alone?

A. No, I had no partner, I never had any partner.

Q. You made money out of it, didn't you?

A. Yes, I made a little money near the Montana Central Railroad tracks.

Q. You know where the Montana Central tracks are then, do you? A. Yes, sir.

Q. That track runs right across this ground, doesn't it? A. Yes, they bought some ground from me.

Q. Well, the surface of this "Childe Harold," or the ground you have described as working on in '87, your Montana Central ground, runs right across it, doesn't it?

A. Yes, sir.

Q. Do you know where the passenger depot of the Montana Central is? A. Yes, sir.

Q. That is right on this ground, isn't it?

A. I believe so, on the northern or on the west corner.

Q. And the freight depot, too, isn't it, is on this ground?

A. The freight depot is over in the center.

Q. And all the tracks are on this ground?

A. No, this claim just takes a portion of these tracks, it just goes down to the northern line of this track, so far as I know.

Q. Do you know what year the railroad was built down there? A. In '78.

Q. Are you pretty sure about that?

A. I am pretty sure, if I am not mistaken.

Q. Pretty sure of that?

A. Don't ask me about being sure of this—I believe it was in '78.

Q. Your memory for dates is pretty fair, isn't it?

A. Not for dates, but for years it is pretty good.

Q. I understand that you say you are pretty certain that the railroad was built there in 1878?

A. The Montana Central Railroad was built there in '78.

Q. You are pretty positive of that, aren't you?

A. Don't ask me about being positive.

Q. How far with reference to the freight depot of the Montana Central—how far off is this Parrot gulch that you mentioned this morning?

A. Six hundred feet.

Q. In what direction is it?

A. The Parrot gulch is six hundred feet east of the freight depot.

Q. What direction does the Parrot gulch run in—the general direction?

A. The general direction runs north and south.

Q. Were you sinking for ore at the time you made this discovery on the Morning Star, or did you uncover it in that cut you were making in your placer digging?

A. I uncovered it when I made this cut for placer diggings to run into my ground there.

Q. Did the cut go right through the rock, or was the rock at the bottom of the cut?

A. No, it was kind of a little wash outside of my cut where I ran north and south; I ran that cut north and south, and then I seen this little channel, and I piped that out before I got into my ground, then I struck this lead.

Q. This lead, then, was some little distance below the surface of the earth? A. Yes, sir.

Q. How many feet below the surface of the earth?

A. About four or five feet in the main channel.

Q. And it was there that you sunk your shaft?

A. There is where I sunk it.

Q. Did you wash out all the earth around there when you were sluicing this ground?

A. Yes, that way (indicating); the channel runs in this way, and the middle was about five feet deep, and then it ran up to about one foot deep, you understand.

Q. Now, how many feet did you sink on the hole there in 1877? A. About six feet.

Q. You did that, you say, between December first and January first, '78?

A. In '77, when I made my location, when I located this claim, that was in July, '77, I think—I would not be

positive, but I believe so—then I sunk the shaft when I had no water in the fall, I sunk that shaft in there then.

Q. Who worked with you? A. No one.

Q. How did you sink—right through solid rock there? A. Right through solid rock.

Q. Pretty hard rock, was it?

A. No, it was not hard rock.

Q. What kind of tools did you use to sink through that rock? A. Pick and shovel.

Q. You could just pick it and shovel it right out, could you?

A. No, I had to pick it and shovel it out, and throw the big boulders on the dump, and the smaller ones I shoveled them back all the time on the north side of the shaft.

Q. Did you find boulders in that shaft?

A. No, there is no boulders there, they are square rocks about a foot square, it is quartz.

Q. These boulders you took out?

A. Yes, what I called lead rock.

Q. You don't mean the boulders that are in the earth around there, when you speak of boulders do you?

A. No.

Q. You got chunks of ore out did you; about how big would you say they were?

A. About a foot square.

Q. How wide was that vein that you discovered there?

A. The vein was already this green ore, and was about eighteen inches wide, and then I had six inches of this brown ore on the foot-wall, and a little over two

feet I left standing on the hanging wall, of this brown ore.

Q. And that is where you got these chunks a foot square? A. Yes, I could just take them out.

Q. They came out easy?

A. I didn't need to blast at all.

Q. What was the color of this vein matter when you first uncovered this ledge in '77 with your sluicing?

A. This eighteen inches to two feet, that was green ore what I just explained to you, that was green, then there was about six inches on the foot wall that was brown ore, kind of brown.

Q. In that vein you had two kinds of ore did you, one ore brown and the other green?

A. Two kinds of ore.

Q. One brown and the other green?

A. Yes, sir.

Q. In the second hole that you dug, what was the color of the ore there?

A. I sunk it eight feet deep, and that was all brown ore, and then—(Answer interrupted.)

Q. Did you have to sink down eight feet before you found ore?

A. No, I had it right on the surface; I know how this lead ran then you see, and then I sunk right on it you understand.

Q. Was the ore cropping out above the surface?

A. No.

Q. How far below the surface did you have to go to get it? A. About one foot.

Q. You dug it right down then? A. Yes, sir.

Q. What year did you dig that hole?

A. In the spring of '78.

Q. On the first hole did you dig in '78?

A. No, I dug that all in '77.

Q. You didn't do any work there at all in '78 on the first hole?

A. No, I sunk eight feet in the second hole and then I struck the green ore, and then I sunk two feet more and then I had green ore in the hole, too.

Q. That was in the second hole? A. Yes, sir.

Q. You didn't strike any brown ore at all, did you?

A. Yes, I had brown ore just as soon as I got in a foot from the surface, then I struck right on the brown ore.

Q. Did you work on either of these holes after '78?

A. No, sir.

Q. When did you sell your claim to Mr. Kropf?

A. I would not be certain whether that was in April, '79, or April, '80, I would not be certain.

Q. You are pretty sure you sold it to Mr. Kropf?

A. Yes, I sold it to him.

Q. Don't you remember a little visit that I paid down to your cabin about three weeks ago with Mr. Shores and Mr. Lippincott? A. Yes, sir.

Q. Didn't you tell us in the conversation that we had with you at that time that this Morning Star of yours had been jumped away from you? A. Yes, sir.

Q. Then, how is it that you sold it after it had been jumped?

A. You see they didn't jump it properly, two men and a man by the name of Christ, and a man by the

name of Harmond, I can't tell you their names, they were working for me—they were my workingmen; they said to me, let me jump this claim again and we give you a half interest. ; ;

Q. That was how it was jumped, was it ?

A. They said, we will give you a half interest, and then you don't need any work done on it.

Q. Do you know what year they jumped it in ?

A. In '79.

Q. In January, '79?

A. No, I don't know; it was July, some place.

Q. Was that before or after you sold it to Mr. Kropf ?

A. That was before I sold it to Mr. Kropf; I just sold a half interest to Mr. Kropf.

Q. Did they sell the other half interest to him then ?

A. I believe so.

Q. What did Kropf do with the claim ?

A. He worked it a little while and he couldn't keep the water out, and he gave it up.

Q. There was plenty of water down there on that claim ?

A. Plenty of it, plenty of water.

Q. It would be pretty expensive to work it on account of the water ?

A. Yes, sir.

Q. Had to be pumping out all the time ?

A. Yes, and that takes big machinery.

Q. How far down did he go before he struck water ?

A. I think he struck water in fourteen feet from what we call the surface now, but then I had worked off from two to five feet of the surface already, and then I sunk down about ten or eleven feet, and that got the water in.

Q. You say that you had a talk with Mr. Noyes, in

which Mr. Noyes stated that that was no claim for a poor man to have, did you not? A. Yes, sir.

Q. When was it you testified you had the talk with him?

A. That was a thing I couldn't say.

Q. Could you fix it any nearer than between '77 and '80?

A. No, sir, Mr. Bernard's talk I can fix.

Q. But the Noyes talk you cannot fix other than between '77 and '80? A. No, sir.

Q. Was it before or after you sold out to Mr. Kropf, that you had that talk with Mr. Noyes?

A. That was before.

Q. Were you working on that claim then?

A. No, I was working placer ground right close by, right north of it.

Q. Had you filled up these holes or dump piles at the time you had the talk with him, with Mr. Noyes?

A. No, not at that time.

Q. The dump piles and the holes were filled up after that time? A. Yes, sir, after.

Q. Do you remember what Mr. Kropf paid you for the claim?

A. I can't recollect that.

Q. Can you give us some idea of it? A. No.

Q. It was less than a thousand dollars, wasn't it?

A. It was less than a thousand dollars, I would not be certain.

Q. Was it five hundred dollars; can you come as near to it as that?

A. I can't exactly tell any more.

Q. Well give it as near as you can?

A. Well, \$75.00.

Q. That is what he paid you for a half interest?

A. For a half interest.

Q. Do you know what he paid the other men for the other half interest? A. I don't know.

Q. Do you know a claim in that neighborhood by the name of Annie Mack? A. Yes, sir.

Q. You have heard of it before? A. Yes, sir.

Q. It is a quartz location on what is called the Emery placer, isn't it? A. Yes, sir.

Q. How far from this hole that you say you dug in 1877, is this Annie Mack situated?

A. Between six and eight hundred feet west and a little of south.

Q. We had a contest over that Annie Mack a little over two years ago, didn't we? A. Yes, sir.

Q. And you were one of the parties to the contest, were you not? A. Yes, sir.

Q. You were a witness that testified in that hearing, were you not? A. Yes, sir.

Q. In fact you are the same Charles Colbert that testified in that hearing, aren't you? A. Yes, sir.

Q. I will ask you whether or not in that examination, on that contest, you did not testify that you, so far as you were concerned, would not give five dollars for all the quartz in a half a mile square on the Annie Mack ground?

A. Of course, I did, and I say that to-day.

Redirect Examination.

By *Mr. Clark*. Q. Explain why you made that answer at that time?

A. I says, there is too much water there, and I am too poor; a man what ain't got money enough to work there, any man what's not got fifty thousand dollars, he has no business there, there is too much water there.

Q. Do you mean to say, that, if you could get out all the quartz there maybe within a distance of a half a mile in that locality you would not give five dollars for it, if you had the means of getting it out?

A. No, not if I had the means; I meant to say, a man what has not fifty thousand dollars, he has no business there.

Q. Do you think if a man had fifty thousand dollars that he could get considerable mineral bearing quartz out of the country within a half a mile around there?

A. Yes, plenty of it.

Q. Then you meant when you made that answer, that it would require machinery and money, would it, to get that ore out, and get the quartz out, if there is any there?

A. Of course.

Q. Will you explain, once more, the difference, as you understand it, between the location of the *Morning Star* as you made it, and the present "*Childe Harold*" location, as you understand it to exist down there?

A. Yes, I will explain that: They went a little too much south on what I located before, they went a little more south, and a little more from both sides, you see.

Q. About how many feet would you think was the

difference between the side line of your Morning Star and the side line of the "Childe Harold"?

A. I would say that it was between three hundred and four hundred feet on the southwest corner; a little more south than I had.

Q. Now how many feet east of that point of discovery did you run the Morning Star location?

A. 750 feet.

Q. And how many feet west? A. 750.

Q. From the point of discovery?

A. From the center of the discovery.

Q. Now, as you understand the present "Childe Harold" location, how far east does that run from the "Childe Harold" shaft as it is there to-day?

A. I have not measured it, but I would say from ten to twenty-five feet.

Q. And how far west does it run?

A. That runs not quite fifteen hundred feet west; I account for ten to twenty-five feet on the east side of the discovery shaft, and it runs west from there the difference between fifteen hundred feet and that.

Q. You said something about there being an Emery placer location to the east of the Morning Star location, as you made it; now, was that placer any part of the Morning Star? A. Yes.

Q. About how many feet on the Morning Star was it? A. I would say about two hundred feet.

Q. About two hundred feet on the east end?

A. On the east side, two hundred feet—I will say two hundred feet on the east line.

Q. Who did that placer belong to?

A. Mr. Tong and Mr. Marsdon and Mr. Emery, I believe, and Mr. Jones; or no, Mr. Jones and Mr. Marsdon, that is all.

Q. You say, if I understand you correctly, that at the time you discovered this Morning Star vein—was it on public ground or on ground already owned?

A. No, public Government ground.

Q. Was the point at which you made the Morning Star discovery upon public ground, or was it ground that belonged, as you understood it, to some one else?

A. On the public ground, that has been public ground that belonged to the Government.

Q. Any one else claim it? A. No, sir.

Q. Then the discovery shaft of the Morning Star was not upon your ground at the time you made it?

A. Not at all.

Q. You are sure of that? .

A. I am positive of it.

Q. Now, tell us once more about what year, to the best of your recollection, was it that the Montana Central Railroad was built there?

A. In 1888, I believe; that is my best recollection.

Q. You stated before on your cross-examination that you thought it was in '77 or '78? A. No.

Q. Then you are mistaken about that?

A. No, it was 1888. I was mistaken when I said that; it was in 1888 the road was built.

Q. I want to have you tell me as nearly as you can where the northeast corner of the present "Childe Harold" claim, as near as you understand it, is, with reference to the discovery shaft of the "Childe Harold?"

A. The northeast corner, about between four and five hundred feet south of where I am living now, south of my house.

Q. I am not asking you about your house, and I don't want the direction of it from your house.

A. It is right south of the Montana Central switch ground. They have another switch in there. I ain't certain, probably they will run right on top of it. They have a switch there.

Q. Where is that northeast corner--what direction is it in from the discovery shaft on the "Childe Harold" claim?

A. North, a little of east.

Q. About how far from the discovery shaft?

A. About three hundred feet.

Q. Didn't you make a mistake when you said it was west of the discovery shaft? You said it was west when Mr. McIntire was examining you. Now I want to know what direction that northeast corner is from the discovery shaft of the "Childe Harold?"

A. That is north, a little of east, about three hundred feet. I don't want to make any mistake here.

Q. And when you said west you were mistaken, were you not?

A. I was mistaken entirely then.

Q. Now I want to ask you once more to tell us the year, as nearly as you can recollect it, when you saw Mr. Ringeling down there making a survey--the first time you saw him down there making a survey--about what year was it?

A. I say it was, I believe it was in '83. I would not be positive.

Q. That is the best of your recollection?

A. Yes, to the best of my recollection.

Q. Who did you see with Mr. Ringeling at that time, if anybody? A. I didn't see anybody.

Q. Do you remember what what you saw him doing there? A. He was surveying this claim.

Q. Did you see any instruments, or see him taking any observations from the discovery shaft there?

A. Yes, sir.

Q. Did you see him down there more than once or twice, or, to the best of your recollection, how many times did you see him there at work?

A. I seen him, I would not be certain, but two times, I would not be certain, it is so long ago.

Q. Do you remember whether you saw him locating any posts or monuments, or anything of that kind or description at that time?

A. I seen him planting that southwest corner, I seen him planting a post there—that I seen; that is the only corner I seen, but I went around the claim afterwards and I saw three.

Q. What were those three that you saw—that is, what were their directions?

A. It was northeast, southeast and southwest—they are the three corners I seen; I did not see the northwest.

Q. I want to ask you once more to tell us about that sale that you say you made to Valentine Kropf, the sale of the Morning Star, I think it was, you said?

A. Yes, sir.

Q. Now, at the time you were there in the fall of '78

or the spring of '79—or what time in the fall of '78 or spring of '79 was it that you made that sale?

A. It was in '79 or '80, I would not be exactly certain.

Q. Well, at the time you made that sale to Mr. Kropf, did you or did you not own the Morning Star claim? A. Yes, sir.

Q. Did you own the whole of it or part of it?

A. Part of it—half of it.

Q. How much did you sell to Mr. Kropf?

A. I sold half of it.

Q. How much did you say he gave you for it?

A. \$75.00.

Q. After you had sold it to Mr. Kropf, did you ever see him there around the claim?

A. Yes, he worked it for several days, and then the water bothered him and he threw it up.

Q. What work did you ever see him doing?

A. He sunk a shaft.

Q. Which one?

A. The discovery shaft of the Morning Star.

Q. Were you ever there at that shaft while he was at work in it? A. Yes, sir.

Q. State whether or not you ever saw him digging at the time he was there?

A. He couldn't dig much, he had too much water to attend to, he couldn't dig; I seen them hoisting water more than half of the time.

Q. What work you saw him doing was, as near as you can remember, mostly hoisting water?

A. Yes, sir.

Q. Did you ever see him do any work in the second hole? A. No, sir.

Q. You said something about a quartz claim you had there in that immediate neighborhood, that you bonded to somebody? A. Yes.

Q. What was the name of that claim?

A. The "Childe Harold Number Two."

Q. How near is the "Childe Harold Number Two" to the Morning Star?

A. The "Childe Harold Number Two" joins the "Childe Harold Number One," we will call it number one, on the east.

Q. Did you have any other name for it—for the "Childe Harold Number Two"? A. Yes, sir.

Q. What did you call it?

A. The Green Copper, we have a green copper lead there too.

Q. Now, Mr. Colbert, you gave that bond, or did you give that bond for a valuable consideration?

A. Yes, sir.

Q. Now, what did you bond it for?

A. For fifty thousand dollars.

Q. For what period of years, what length of time, one year or twenty? A. One year.

Q. The "Childe Harold Number Two" joins the "Childe Harold Number One" immediately on the east, does it? A. That is what it did.

Q. Then that Green Copper or the "Childe Harold Number Two," that you bonded for fifty thousand dollars, a part of it covered a portion of the Morning Star lode claim, as you originally located it, didn't it?

A. Yes, sir.

Q. It was on the eastern part of it, wasn't it?

A. Yes, between six and seven hundred feet.

Q. Then if you bonded that property for fifty thousand dollars, you think that the quartz claim proposition in that neighborhood is worth something, don't you?

Objected to. Objection withdrawn.

Q. What year was that that you bonded the "Childe Harold Number Two" in? A. In '93.

Q. Was there a shaft on this claim that you bonded in '93? A. Yes, sir.

Q. On what part of the claim was that shaft located?

A. It is on the "Childe Harold Number Two" and the Green Copper, both of them.

Q. Well, were there two claims?

A. There is two of them.

Q. The "Childe Harold Number Two" and the Green Copper? A. Yes.

Q. And you say there is a shaft on both of them?

A. There is a shaft there on both of them.

Q. Well, take the "Childe Harold Number Two" first; on what part of the "Childe Harold Number Two" is the shaft on?

A. On the west end, the extreme west end.

Q. About how many feet south of the shaft, from the discovery shaft on the "Childe Harold"?

A. From ten to twenty-five feet, and probably a little more, I have not measured it.

Q. Ten to twenty-five feet? .

A. Further out, yes.

Q. Now we will take the Green Copper; on what part of the Green Copper is the shaft located?

A. It is more north: the "Childe Harold Number Two" is five hundred feet east of this shaft here on the Morning Star, you understand, and this Green Copper is the shaft where the windlass is on.

Q. Now, what is the distance between the shaft of the "Childe Harold Number Two" and the "Childe Harold Number One"? A. Five hundred feet.

Q. What is the distance between the shaft on the Green Copper claim and the shaft on the "Childe Harold Number One"?

A. From ten to twenty-five feet, probably a little more.

Q. In what direction? A. East.

Q. In what direction from the shaft on the Green Copper is the shaft on the "Childe Harold Number One"?

A. It is west, just west: west, and from about ten to twenty-five distant from it.

Q. Now, which one of these claims was it, the "Childe Harold Number Two" or the Green Copper, that you bonded, or did you bond them both?

A. I bonded them both to a man by the name of Evans, Daly's brother-in-law.

Cross-Examination.

By *Mr. McIntire*. Q. Who located the "Childe Harold Number Two"?

A. Me and a Mr. Burton.

Q. When was that located, what year?

A. In 1886 or 1887.

Q. It was then that you made the discovery on it?

A. Yes, sir.

Q. You say that it is immediately east of the "Childe Harold" claim? A. Yes, five hundred feet.

Q. The east line of the "Childe Harold" then is the west line of the "Childe Harold Number Two"?

A. Yes, they join.

Q. Did you have the same corner stakes there for each of them? A. Yes, sir.

Q. Is not that claim also called the Sunbury?

A. Yes.

Q. Who gave it the name of the Sunbury lode?

A. Mr. Mantle.

Q. When was the Sunbury lode located?

A. Just about the same time.

Q. Well, what was the difficulty on the "Childe Harold Number Two"?

A. We got ahead of them in the recording business here; we located on the 6th day of June and Mr. Mantle found it out that we had it located, and he had a location on the 7th day of June; then from the 7th he made the 4th out of it; he had the "7" wrote with ink, and he put, with a pencil, "4" on it, and I got ahead of him anyhow with the recording.

Q. Where is this Green Copper with reference to the "Childe Harold Number Two"?

A. That is another roguish business.

Q. Where is it located?

A. It is just located, and the Sunbury there just located from ten to twenty-five feet east of the Morning

Star claim; then the Green Copper and the "Childe Harold Number Two" are the same thing, and I bonded them—very near they include the same ground; the "Childe Harold Number Two" runs east a little of north and the other runs east a little of south—in the middle they compare very near.

Q. Towards the west end they include a part of the same ground? A. Yes, sir.

Q. When was the discovery made on that Green Copper—about when?

A. About one year after this "Childe Harold Number Two"—about one year after that.

Q. That would make it about 1886?

A. I wouldn't wonder, yes.

Q. Did you have any contest with the Sunbury lode over that ground?

A. Not at all. We ain't got any contest at all yet.

Q. Has any of that ground been patented, any of the Sunbury, or the Green Copper, or the "Childe Harold Number Two"? A. No, sir.

Q. Was any application ever made for patent?

A. Yes.

Q. Who made it?

A. Mr. Mantle advertised for a patent in the shaft down there, about three feet deep in the shaft. We couldn't read the notice. We didn't see it at all. I never took a patent on it.

Q. Did you have any adverse suit against him for that patent? A. No, sir.

Q. Are you certain the Sunbury lode has not been patented?

A. Yes, I am certain it has not been patented.

Q. What became of this bond you gave to Mr. Evans?

A. He gave it up. There was too much water; his pump wouldn't work and he threw it up.

By *Mr. McIntire*. I wish the record to show that there is a motion made to strike out all the testimony relating to the discovery of vein matter on the "Childe Harold Number Two," Green Copper and Sunbury lodes, as having been made subsequent to the date of the application for patent, the patent obtained being on mineral entry number 511, and which includes the ground in controversy in this present proceeding.

Mr. Cole. We did not bring out any evidence of this kind. If you brought it out, you may have it stricken out.

Mr. Clark. We object to the motion being granted, so far as it concerns any evidence we have brought out in rebuttal by this witness tending to show the value of mining property in that vicinity.

Q. You have stated, Mr. Colbert, that the Morning Star was jumped; what was the name of the claim after this jumping process?

A. I can't tell you.

Q. Did it have the same name as the Morning Star?

A. No, sir.

CHARLES COLBERT.

Subscribed and sworn to before me this 16th day of February, A. D. 1895.

CHARLES F. ROE,

Notary Public.

Valentine Kropf, after being duly sworn on behalf of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. Where do you reside?

A. Here in Butte.

Q. How long have you resided here in Butte?

A. Thirty years last October.

Q. Have you lived in Butte continuously during these thirty years?

A. All but three months when I was down in the Cœur d'Alene country?

Q. In what year were these three months that you were in that country? A. I think in 1883.

Q. In what portion of Butte have you resided?

A. In town here and down here on the creek, down below here, and sometimes up in town.

Q. Now with reference to down below here on the creek, what portion of the town is that in?

A. It is down on Silver Bow creek, a small stream.

Q. Where is it with reference—you know where Mr. Colbert lives do you not? A. Yes, sir.

Q. Where is it with reference to his place of residence?

A. Oh, I never lived close by there, but I used to mine close by there, and I know the ground well.

Q. You used to mine close by where he lives now?

A. Yes.

Q. In what years were you mining in that locality?

A. In the '70s; '73, '74 and '75, I think.

Q. What sort of mining were you engaged in down there? A. Placer mining at that time.

Q. Where were you doing your placer mining, and when?

A. Down there in '76 and '77—no, at that time I was not working in these years; in '73, '74 and '75, I was to work on that placer ground, and in the year '75, I followed quartz mining, and in '76 and '77.

Q. Do you know Charles Colbert? A. Yes, sir

Q. How long have you known him?

A. Since '66.

Q. Did you in the year 1877 or 1878 do any business with Mr. Colbert? A. Yes, sir.

Q. I want you to state what these business transactions were?

A. I bought this ground from him that is in dispute now.

Q. What ground was it that you bought from him?

A. It was called the Morning Star.

Q. You say you bought of him' the Morning Star quartz claim? A. Yes, sir.

Q. Do you remember the time of the year in which you bought it?

A. Now, I think it was long in the spring time.

Q. Do you remember what year?

A. If I remember it was in the summer, I don't remember the year, '77 or '78, it might have been in '79, I forget; I don't remember.

Q. Where was this; describe as well as you can where this Morning Star claim is located, or was it located at the time you purchased it?

A. It lay south of the depot in that neighborhood there, in what they called the Old Parrot gulch, and he ran his tail race to work the surface up above; he worked his tail race through the material in there, and he worked about five or six feet of the surface off and made a narrow cut, and there was a placer tunnel running through there and he worked that off, he worked that all off; the upper ground was cheap, and he had cut a side race to run his tailings off, and while he was doing this he uncovered this green rock.

Q. When did you first know that there was such a claim as the Morning Star?

A. Not until he had this surface worked off, and he dug into, I don't know what that was.

Q. What was the first time you were on the ground and looked it over?

A. About the time I bought it, about a week or so before.

Q. Now describe the circumstances, as nearly as you can remember them, of your first being on the ground and looking it over.

A. It must have been three or four days before I bought it; when I bought it I went through and I noticed it, and I liked the looks of it and thought it would be a good location.

Q. What did you see there?

A. Green rock, quartz, thrown out.

Q. Thrown out of what?

A. Out of this hole here that was four or five or six feet deep.

Q. How big on the top was this hole?

A. Oh, four feet wide, I guess, and it must have been six feet long.

Q. Do you remember whether or not he was there the first time you saw it?

A. No, he was not there.

Q. How came you to notice such a hole—were you working in that vicinity?

A. I was prospecting around looking over the flat, and digging everything in there, and I happened to run across this and it looked well—that is, it looked like good copper prospect at that time.

Q. Where was that hole when you first saw it, taking any landmark around there that you can recollect at that time, where was it located?

A. Well, it is south of this here tile works now, I have not been there lately, the Butte Tile Works and sewer pipe making business, down there somewhere.

Q. Did you say it was south of this tiling works?

A. I think it is, it may be a little south of east.

Q. Do you know where Mr. Colbert's house is, where he has lived for a good many years now?

A. Yes, sir.

Q. Was he living in that same place at that time?

A. Close by his cabin.

Q. Where was that cabin in which he was living at that time with reference to the cabin in which he is living now?

A. I do not know; I have not been on that ground since he built the new one.

Q. Do you remember the locality around there just near the Parrot gulch?

A. Yes, sir.

Q. Describe that as well as you can, how did that run, what direction, and what way?

A. I think the Parrot gulch runs a little east of his cabin and right close by, and comes down to this here open cut that he ran there.

Q. Was that place, that point, called the Parrot gulch at the time you bought the Morning Star and the Green Copper?

A. Yes, sir. It has been there since I came here.

Q. In what direction does it run?

A. North and south.

Q. Now, this hole that you say you saw there when you were passing by, was located where, with reference to the Parrot gulch?

A. It must have been close by, right on to the Parrot gulch, kind of runs out there, at least into the flat lower down towards the lower depot, that is, the Union Pacific depot, at least more into the flat in that neighborhood; up above it is quite a gulch, quite a depression in the surface down there, it is more flat where he had his discovery, and it is not so well washed out.

Q. Was there any traveled path or road in that neighborhood at that time?

A. Not that I know of.

Q. You say you saw this hole there about eight feet deep?

A. Four or six feet deep from the time he struck the bed rock, and having worked this five or six feet of soil off, the soil was washed off, then he sunk in the bed rock, then he sunk into that bed rock four or five or six feet deep where I saw it.

Q. Did you look into it much? A. Yes, sir.

Q. What did you see there?

A. I saw some green rock in it, and some that he had thrown out on the surface.

Q. How much was there thrown out?

A. Several tons—I cannot say how much.

Q. Was it a bright velvet green, or brown, or what color? A. No, it was just copper colored ore.

Q. What would quartz of that color indicate to you as a man who was experienced in mining?

A. I was sure that it was copper croppings anyhow.

Q. Did you see at that time any other holes in that neighborhood, in this passing that you have spoken of?

A. Yes.

Q. How many? A. One.

Q. Where was that second hole located with respect to the first one?

A. West, maybe 75 or 80 feet.

Q. Well, do you say that the first time you went there you noticed that second hole? A. Yes.

Q. Describe what you saw?

A. Sort of a yellowish ore, brownish ore; there was no green ore on the surface; there was no depth sunk into it at that time.

Q. How deep was it at that time?

A. About three or four feet deep I guess.

Q. How wide was the hole at the surface?

A. At the top about 5 or 4, or 5 or 6 feet, just as near as I remember.

Q. Did you see anything in that hole, that, in your opinion, was quartz or ore?

A. Oh yes, what he had there was quartz, it showed quartz.

Q. How much was there thrown out at that second hole?

A. At the second hole, maybe a ton or two.

Q. What was its appearance, brownish, or redish, or yellowish.

A. I don't know now, it had, to my notion anything but green color, I could not see any green in that hole, but I saw a variety of colors.

Q. You say you have worked at quartz mining a good deal? A. Yes, a little.

Q. Do you know what is called, in mining parlance, a vein or lead when you see it? A. I think I do.

Q. Did you see anything in the second hole which looked like a vein?

A. It looked fairly like a vein.

Q. What about the first hole?

A. That looked first rate.

Q. You saw the vein there didn't you?

A. Yes, sir.

Q. Had the vein a foot wall?

A. Plain foot wall.

Q. How deep was that vein that you say you saw in that first hole?

A. It must have been the width of the shaft, I think four feet.

Q. That is vein matter of course?

A. Yes, sir. The green rock was not quite that wide: this lead matter was the width of the hole.

Q. About how wide do you think the green matter was?
A. That I have forgotten.

Q. Did you see in the second hole any wall?

A. I don't remember that, but there was quartz there, what he threw out, and I didn't notice the wall of that like I did in the other hole.

Q. Then you cannot tell how wide the vein that was exposed in the second hole was?

A. No, I didn't examine that as close as I did the one in the cut.

Q. How many times did you look at those two holes?
A. I went there the second time.

Q. How long after you went there the first time was it that you went there the second?

A. A day or two afterwards.

Q. What did you do the second time?

A. I took a fellow with me.

Q. To look at it?

A. Yes. Harvey McKinstry.

Q. Did you look at both holes when you went there with McKinstry?
A. Yes, sir.

Q. About what time was it that you went there with Mr. McKinstry—what year?

A. Well, just some time—I don't know the year—the records will show. I think it was about—it will show upon the record—I can't say.

Q. Well, what did you and McKinstry do at the time you went there with him?

A. Well, we made up our mind that if it was for sale we would buy it.

Q. Did you make any examination of the vein mat-

ter in these two shafts, or any examination of the vein matter which was thrown out on the surface?

A. We broke some of the rock, and I think Mr. McKinstry took a sample of the rock and had it assayed. I would not be positive on that.

Q. Well, what was the next thing you did?

A. We saw Mr. Colbert.

Q. How long after that visit that you and Mr. McKinstry made to these two holes was that?

A. Oh, it was only, I don't remember, a day or two, or it might have been the next day

Q. Did you both go to see him? A. No.

Q. Who went? A. I did.

Q. Do you remember where you found him?

A. Yes.

Q. Where was he? A. At his house.

Q. Did you at that time make any purchase of this claim?

A. Yes, I mentioned it to him and asked him what he would take for the ground, and he said he would take seventy-five dollars, and I took him up at his word and paid him the money and got a deed for it.

Q. Did he give you a deed that same day?

A. I don't recollect.

Q. Are you certain you received a deed for it?

A. Oh, yes. Just as quick as I paid him the money I got the documents for it.

Q. What interest in the property was conveyed by the deed? A. That I don't know.

Q. Did you know at the time?

A. I don't remember, but I should think that we had

the whole of it, I ain't sure now; I heard him testify, he said he sold half, but I think we got the whole thing, but I can't say positively.

Q. Was the deed given to you personally or to Mr. McKinstry? A. It was given to me.

Q. Do you remember whether Colbert showed you, at the time you took the deed of the claim from him, the boundaries of the claim? A. I think he did.

Q. Do you remember how many boundaries, if any, you saw?

A. No, I do not, he showed them by standing somewhere near the discovery and pointing in the direction, and I could see some of the stakes sticking up, somethin like scantlings, from the discovery in the directions pointed, though I did not go to them; I was not interested in the boundaries, I was just interested in the discovery—that is what took my eye.

Q. Now, can you remember about how far these corner posts were that he pointed out to you from this shaft or hole where you were standing with him?

A. Oh, I would say six or seven hundred feet, something like that.

Q. In which direction? A. East and west.

Q. Do you remember whether you saw one of these posts, or two or four of them?

A. I think I saw three of them, I ain't sure, I saw a couple plain enough.

Q. Do you remember of having seen the north one at that time, or any location notice?

A. That I don't recollect.

Q. Do you remember whether or not Colbert stated to you at that time how large the claim was?

Mr. McIntire. We object to that, as it would be hearsay, Mr. Colbert never having been a predecessor to the plaintiff to any portion of the ground in dispute.

A. I cannot say, but as near as my memory comes, I think he said it was a full claim; but I am not positive about that.

Q. Well, after you had bought it from Mr. Colbert, as you say you did, what did you do?

A. Mr. McKinstry and myself hauled our tools down there one day, and windlass, and set her up and sunk down to water; I forget how deep we had to go, 4 or 5 or 6 or 7 feet until we struck water, and then we had too much water, and we couldn't go into it with a windlass, and we gave it up, and we couldn't find no pay rock to suit ourselves at that time; we were satisfied that there was good ground there, but we couldn't handle it.

Q. Where did you set up this windlass?

A. Right on this discovery.

Q. Was it on the first hole or the second hole?

A. The first one, the one in the cut.

Q. How deep did you dig in that hole before you struck water?

A. Well, it might have been six feet or eight feet, I don't remember.

Q. Do you remember what the formation was that you went through?

A. Yes, sir.

Q. What was it?

A. Granite wall rock, and inside of these walls there

was this green rock and brownish rock; two kinds, and a horse matter too; there was some ore in there, quartz in our wall rock, what is called dirty matter, bastard quartz, as they call it, some of that between these walls; the walls must have been four feet wide or more, may have been more, and, of course, it had green rock in it, and a little brown rock, and some dirty rock.

Q. What did you do with what you took out?

A. Threw it on the dump.

Q. How much do you think you took out?

A. I don't remember, several tons.

Q. Do you remember how long you worked there?

A. No.

Q. Or about how much work you did?

A. Several days, I don't remember.

Q. Both of you together? A. Yes, sir.

Q. Did you employ McKinstry?

A. No, sir, he was a partner of mine.

Q. Do you remember about how deep you sunk that hole when you encountered the water?

A. It must have been from the surface, that is from the alluvial surface down to the water, must have been eighteen or twenty feet, or over, from where the bed rock was struck it was maybe fourteen or fifteen feet.

Q. After you had worked there several days, you quit? A. Yes, sir.

Q. What was the reason for that?

A. On account we could not get any further, there was too much water for us.

Q. Well, did you ever do any work on that claim after that? A. No, sir.

Q. And you never did any work on the second discovery hole? A. No, sir.

Q. You cannot remember then whether it was in the summer, or in the spring or fall, or when it was?

A. No, sir, I think it was in the forepart of the summer; but I ain't quite sure.

Q. After you quit work on it, what did you do with it afterwards, did you sell it, or what?

A. No, sir, I never bothered any more with it.

Q. What do you say with reference to the relative lightness or heaviness of the vein matter that you took out of the first hole, was it heavier than ordinary rock, or lighter, or what?

A. The green ore seemed to have quite a weight, that was heavier than ordinary rock.

Q. And then, you say, you left it after this work was done and you never did any more work there?

A. No, sir.

Q. Did you abandon it or what?

A. I guess we quit it.

Q. Do you remember, or do you know anything at all, of your own knowledge, in regard to the location which was made upon it, upon substantially the same ground, known as the Morning Star ground by one Harvey McKinstry? A. No, sir.

Q. He was your partner at the time you were working it—working the Morning Star? A. Yes, sir.

Q. How long did you and he remain in partnership after he and you quit work?

A. Just when we quit work, we quit, and then I told him I would throw it up.

Q. Then you parted, is that the idea?

A. Yes, sir.

Q. Do you remember of ever having seen any one after that doing any work at either of these holes?

A. No, sir.

Q. Do you remember of ever having seen any location notice after that on this ground?

A. No, sir, I never bothered myself about it.

Cross-Examination.

By *Mr. McIntire*. Q. You say you told Mr. McKinstry that you would throw up that claim?

A. Yes, sir.

Q. Why?

A. Well, we couldn't handle it on account of the water.

Q. You mean by that, you didn't think it was worth working?

A. Well, I didn't say that; the water was too heavy for a windlass and we quit it, it was more water than dirt and we thought we would let it alone; that was mostly my own opinion; he was not so well supplied.

Q. How long did you and McKinstry work—how long did McKinstry work after you left, if he worked at all?

A. I don't know whether he worked any more afterwards or not, he might have.

Q. Can you fix any nearer the year when this transaction occurred than you have?

A. I can not, it is quite a while, and some things of that kind I don't take any interest in, and I forget the dates.

Q. You took a deed at the time you bought it from Colbert? A. Yes, sir.

Q. Was it acknowledged before a notary public?

A. That I don't know.

Q. Or a justice of the peace?

A. That I don't know.

Q. Was it put on record? A. I think so.

Q. Did you put it on record?

A. I gave it to Mr. McKinstry to attend to it and it is recorded, it was to be recorded in the abstract office.

Q. That, of course, would be in Deer Lodge county at that time, would it not? A. Yes, sir.

Q. Yes, of course it was Deer Lodge county at that time? A. Yes, sir.

Q. You stated in your direct examination that you couldn't find pay rock to suit you, and you threw up the claim, did you not?

A. Yes, on account that we couldn't get any pay rock, because we didn't have enough to get the water out.

Q. You had an idea, that, if you sunk only deep enough you would find good pay rock, did you?

A. That was the idea that we had, if we got deep enough we would find something; that is the reason we bought it.

Q. It was a location that would require the expenditure of a great deal of capital, at any rate, would it not, to make it pay?

A Yes, it seems so. It would take money to open it and go down on it.

Q. In taking this deed from Mr. Colbert, did anybody else sign it? A. I don't recollect.

Q. Did you see Colbert sign it?

A. I don't remember.

Q. Do you remember the name of the claim which he sold you at that time? A. I do not.

Q. Don't even know whether it was called the Morning Star do you? A. No, sir.

Q. In the beginning of your examination you stated that you knew the ground in dispute. What is the ground in dispute in this action?

A. Well, it is this particular ground that I brought from him.

Q. All of it or part of it?

A. Well, I don't know now whether it was the whole of it or part of it.

Q. You don't know anything about the "Childe Harold" boundaries, do you? A. No, sir.

Q. Whether they are identical with the Morning Star or not, do you? A. I do not.

Q. When were you last on this ground?

A. It has been a year.

Q. Then you don't know whether it had been a year or ten years, do you? A. No, sir.

Q. It might have been ten years?

A. It might have been.

Q. Would you say you had been down there for ten years?

A. I didn't say that, it has been quite a number years since I have been on that ground.

Q. At the time you first saw this hole that you described there, was there any dirt at the bottom of it?

A. No, the hole was cleaned out, and nothing but ledge material in it; the hole must have been five or six feet deep.

Q. What was surrounding the ground there?

A. The surface was alluvian or placer ground.

Q. Was it placer ground?

A. Yes, it was on the lower end of it—some of Mr. Gilbert's placer ground.

Q. Was the ground around this hole placer ground?

A. It had been placer ground on top around this hole, and he put a sluice there as stated before—west—through it.

Q. Then the surrounding earth had not been washed at all?

A. No, only a gangway through.

Q. Only this channel that he had run up to this placer ground?

A. Yes.

Q. And this channel, you say, was run up from what you call the Parrot gulch?

A. It must have been in that neighborhood.

Q. How wide was that channel that had been washed out?

A. Five or six or seven feet wide, maybe eight.

Q. It was just a narrow channel?

A. Yes, just a narrow tail race.

Q. The stuff which had been taken out of this hole was thrown in this channel?

A. Yes.

Q. Where was that stuff thrown?

A. On both sides of the hole. On the alluvial ground around the hole, and in this channel.

Q. Then you would have to go up to the hole to find the stuff that he had taken out, would you not?

A. Well, the dirt that he took out came right snug to it: you could stand on either bank of this gulch and look down in this channel and see it.

Q. Was the dump much of a pile?

A. Considerable.

Q. You say several tons: how large a pile was it?

A. Well, I don't know now, there were several tons on the ground of what he had thrown out of the shaft.

Q. Were there chunks of any size in that dump?

A. There was some quite good sized chunks amongst them.

Q. Can you give us the size of any of them?

A. That is forgotten.

Q. Was there any water in the hole when you first saw it? A. No, sir, it was dry.

Q. In regard to this second hole that you say is 75 or 80 feet west of the first one, how deep was that at that time?

A. It must have been three or four or five feet at that time.

Q. Where was the stuff that was thrown out of the hole piled? A. All around the hole.

Q. On the alluvial ground?

A. Yes, sir, right on top of the surface.

Q. That was entirely different looking stuff from what you saw in the first hole, wasn't it?

A. Yes, sir.

Q. Did you go down in the second hole at all?

A. No, sir, I did not.

Q. Nothing induced you to go down into it?

A. No.

Q. Never looked into it at all, did you?

A. Oh, yes.

Q. But only from the surface?

A. From the surface.

Q. You did not examine it then?

A. I examined the rock and sized up the hole, but I didn't go into it.

Q. Was there any walls in the hole? A. No.

Q. Did you say there was a wall in the other hole?

A. Yes, sir.

Q. What is the dip of that vein? A. South.

Q. The dip of the material was to the south, was it?

A. Yes.

Q. Did you notice the course of the vein matter?

A. The course of the ledge seemed to run east and west.

Q. And how wide was the hole?

A. The full width of the hole that he had started must have been four feet wide.

Q. And what length? A. Six feet or over.

Q. Was the hole larger than the size of the top of this table here? A. Yes, more in length.

Q. Now, which was the wide side?

A. East and west.

Q. And the shortest, north and south?

A. Yes, the long way of the hole was east and west, and the width was north and south.

Q. Now, the vein matter ran across each side of the hole through the long side or the short side?

A. Ran the length of the hole.

Q. Was that green stuff apparent right at the beginning of this vein in the first hole?

A. From the surface, as it struck it with this cut.

Q. And it was green right up to the surface?

A. Yes.

Q. What did you do with the stuff that you took out of there?

A. We dumped it on top of his dump.

Q. In the same place? A. Yes.

Q. You only worked in that one hole, did you—the first hole? A. In that one hole.

Q. And your dump was also in that channel?

A. Yes.

Q. Where is Harvey McKinstry?

A. He is dead.

Q. You have had considerable experience as a quartz miner, have you not? A. A little.

Q. What do you call a little?

A. Well I don't do it all the time.

Q. How many years altogether have you worked at quartz mining?

A. I have been mining since 1857.

Redirect Examination.

By *Mr. Clark.* Q. How did you know that Charles Colbert owned this claim where you saw this hole?

A. Well, I got at that time information somewhere that he owned this ground. When I ran across it I was

prospecting around, and when I ran across this prospect I made inquiries. I might have read a notice, I wouldn't say that, but somehow I found it out at that time that he was the owner of this ground, and I hunted him up.

VALENTINE KROPP.

Subscribed and sworn to before me this 26th day of February, A. D. 1895.

[SEAL]

CHARLES F. ROE.

Notary Public.

Wesley P. Emery, after being duly sworn on the part of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. What is your place of residence?

A. It is near Butte City.

Q. How long have you resided in Butte?

A. Well, I have resided here continuously since 1875.

Q. Prior to that time did you live in the State of Montana? A. Yes, sir.

Q. What is the period of your residence in the State of Montana? A. A little over thirty-one years.

Q. And since '75 you have resided in Butte City?

A. Yes, sir.

Q. What has been your occupation?

A. Principally in placer mining, and I have been engaged considerably in quartz.

Q. Were you living in Butte in 1876, 1877, and 1878? A. Yes, sir.

Q. About these years? A. Yes.

Q. And about that time what was the character of your business? A. I was placer mining.

Q. At about that time, in what locality with reference to Butte were you conducting placer mining?

A. I was conducting placer mining, mining down about four hundred yards northeast of the ground now in question.

Q. Well, locate it by something else with reference to the city of Butte?

A. It is southeast of the city of Butte, about a half a mile from the center of the town.

Q. You say you were working in that locality during about what years, as nearly as you can remember?

A. Well, I lived and worked in that locality for fourteen years.

Q. Beginning at what time, in what year?

A. In '74 I lived there.

Q. Are you acquainted with Charles Colbert?

A. Yes.

Q. Were you acquainted with him in the years 1877 and 1878? A. I was.

Q. Did you know of the existence of any such quartz lode claim in the neighborhood of where you say you were conducting this placer mining in these years called the Morning Star quartz lode claim? A. I did.

Q. Will you describe as nearly as you can the location of that claim with reference to any landmark you can recollect as existing near it at the time?

A. Well, I don't know that I could recollect any landmark, but I could locate the ground from the survey, by

official survey, as lying near the south boundary of Section 18, Township 3 north, Range 7 west.

Q. Have you been a surveyor, has that been your business at any time? A. It has not.

Q. Have you ever occupied any public position here in this county, or in Butte? A. I have not.

Q. You were not at any time the local recorder?

A. I was local recorder at one time.

Q. About what time was that?

A. Well, I think it commenced about 1876 or 1877.

Q. What was that office in its character?

A. It was for the purpose of keeping the records of the placer mining locations of the district, in this mining district.

Q. Of this mining district?

A. The Summit Valley mining district.

Q. How is it that you are able to describe the location of the Morning Star claim by township and section as you have just done?

A. Well, I was one of the locators of a portion of Section 18, known by official survey as the Emery placer.

Q. Do I understand you to say that the Morning Star claim occupied a portion of the ground covered by the Emery placer?

A. Well, it was on the adjoining forty acres to the south of it, on the adjoining forty acres, and I believe it was located right on the line between the two, running both ways, or running nearly both ways.

Q. That is between the Emery placer and what?

A. The two forties across the south of it, the discovery being about twenty feet from the line.

Q. When did you first know that there was such a quartz location in that neighborhood as the Morning Star claim—when did it first come to your knowledge?

A. It came to my knowledge first at the time the location was made in 1877 or 1878, somewhere along there.

Q. Well, what knowledge did you get at the time it was made, if it was made; state the circumstances as nearly as you can remember?

A. Weil, Mr. Colbert told me that he had a discovery—a ledge down there—and I went down to look at it, and he afterwards came to me to make out the notice of location to post on the ground.

Q. Did you go down there?

A. I went down there.

Q. Do you remember about when that was located, as nearly as you can, give the date when he came to you, and you accompanied him to the ground?

A. Well, I cannot locate it as to the date any nearer than I have, and that he located it and recorded it at about that time.

Q. Where were you at the time he was working on that location? A. At my cabin.

Q. Were you living in that neighborhood at the time?

A. I lived about twelve hundred feet northeast of this location at the time.

Q. State exactly what you saw when he took you down there?

A. Well, he took me towards the discovery shaft, to where his discovery shaft was located, and he had a little

hole there, and there was quite a quantity of croppings and green ore, green looking ore.

Q. You say he took you to the discovery shaft, what was that, merely a hole in the ground, or was it covered at the top, or was it an open hole?

A. Well, at the time I was there it was merely an open hole.

Q. Can you give us any idea how deep it was?

A. Well, I think, probably, at that time it was not more than five feet deep, four or five feet deep.

Q. How large on the surface?

A. Well, about a fair average sized hole for a man to work in, you may say four by six, something like that.

Q. Did you look into it? A. Yes.

Q. What did you see there?

A. I seen green looking ore that I supposed to be copper ore.

Q. You say it was green in color?

A. Yes, sir.

Q. Was it quartz formation?

A. It was quartz.

Q. What would such a color in a quartz formation, as you say it was, indicate to you as a man having had experience in mining? A. It indicated copper.

Q. Was the hole that he had there square or round?

A. Well, it was not either one, it was an oblong square, you might call it, or a parallelogram, or something of that sort.

Q. You have had, as you stated in the first place, considerable experience in placer mining, have you not?

A. Yes.

Q. Have you had any experience in quartz mining?

A. I have.

Q. Do you know what a vein is, a quartz vein, or lode?

A. Well, I generally consider that I do.

Q. At the time you went to this discovery hole and looked into it, state whether or not you saw anything, that in the formation of that hole, appeared to you to be a quartz vein or lead?

A. I did see something that I thought was a vein.

Q. I want you to describe exactly what you saw there.

A. Well, I seen a hole in the ground there with green stone or quartz in it, and a quantity thrown out on top of the surface, and some of it left in the bottom, apparently, and contained a vein of ore there.

Q. Can you remember about how wide it was?

A. It was about somewhere near the width of the hole, four feet.

Q. Can you state in what direction it apparently ran, whether it was east and west or north and south?

A. Well, apparently, nearly east and west.

Q. Now, will you tell us, as nearly as you can, about where that hole was situated with reference to any land mark in that locality that you recollect?

A. Well, it is a pretty hard place to locate any land mark; it is pretty near a level prairie there, no natural land marks near it, without we might take the Anaconda hill up there and say it was three-quarters of a mile or a mile south of the Anaconda hill.

Q. Was the Parrot smelter in existence at that time?

A. It was.

Q. Where was it with reference to the Parrot smelter?

A. Somewhere near a half a mile and a little north of west.

Q. Did you know of such a place or locality in that vicinity there called the Parrot gulch at that time?

A. I did.

Q. What was the Parrot gulch, describe it briefly?

A. It was a dry gulch heading up near the Parrot mine and running down through to the Silver Bow creek.

Q. Where was this hole that Colbert showed you at that time with reference to that Parrot gulch.

A. It was nearly directly in the apparent gulch, channel of the gulch where the water had run and left a little gully, a part of the ground being cut out, and the hole was in the bottom of it four or five feet below the surface, below the natural surface.

Q. I will ask you if you know what the wall of a vein is? A. I do.

Q. At the time you looked into this first hole upon that first occasion, state whether or not you saw anything there which indicated the existence of a wall?

A. I did.

Q. Can you describe, Mr. Emery, what appearance in the face of rock or quartz a hole like this shows?

A. Well, at the time I seen the place the bed rock was naked, both sides of it stripped clean down, and the hard bed rock and quartz cropped up close to the surface, and there were quartz croppings on both sides, and in sinking the hole Mr. Colbert had cut it about out

to the granite, and merely took out the quartz out of the hole, the quartz and the casing which usually accompanies a quartz vein.

Q. Was there any quartz near the surface of this hole at the time you first came there?

A. Well, the quartz didn't crop up only as I have said before in that gulch where he had washed the surface off for the purpose of using it for a tail race, or opening, for some placer ground just above there.

Q. At that time did he show you anything else, did you see anything else at that time?

A. He hadn't sunk the holes further to the west at that time; when I was first there; that was all there was there, what I have just described.

Q. What else did you do at the time, after he had showed you these holes—what did you do at that time?

A. At that time Mr. Colbert gave me a piece of ore, or I got it on the dump, I would not be sure which, and took it up to the house and assayed it; I am an assayer, but I don't make any assays for money, I assay for myself; I didn't take that piece of rock out of the hole there, Mr. Colbert gave it to me or we broke it off the rock there at that time, I don't remember which.

Q. After he gave it to you, or did he give it to you at the time you were there?

A. I would not be sure about that.

Q. However you got it, you took it to the house, you say, and assayed it?

A. Yes.

Q. Do you remember the result of that assay?

A. Well, I told Mr. Ringeling something the other day, and since that time I have concluded that I was a

little bit wrong about it. As nearly as I remember, the assay was 17 per cent copper and about five dollars in gold, with only enough silver in it to part it conveniently—about five dollars in gold. When I gave the result to Mr. Ringeling I only guessed at it.

Q. Did you ever go down there after that?

A. I was around there enough when Mr. Colbert was sinking a hole further to the west.

Q. On what part, what appeared to be the same ledge?

A. Over there at that second hole.

Q. Did you say it appeared to be the same ledge?

A. Yes.

Q. Why did you think it was?

A. Well, the direction of the ledge pointed right straight from one hole to the other, and indicated that both holes were on the same ledge.

Q. How long after you went down there first was it that you went down and saw that second hole he dug?

A. I would not be certain about that.

Q. Do you think it was in the same year?

A. Well, I think it was in the same year, later in the season.

Q. How far was the second hole from the first one?

A. Well, as near as I can remember, it was about 75 or 100 feet.

Q. In what direction?

A. Nearly due west, not quite.

Q. At the time you saw that second hole, could you give us any idea how large it was?

A. Well, it might have been six or seven feet long and four or five feet deep.

Q. Did you look into it? A. Yes, sir.

Q. What did you see there?

A. Well, a kind of a brown-looking ore in there, not very much good, poor ore, mixed up some with granite.

Q. Did you see anything there that looked like a vein in the second hole?

A. Yes, there was a vein in there.

Q. Could you tell how wide it was?

A. Well, apparently about four feet, the vein matter and ore and granite mixed.

Q. What, according to your recollection, was the direction of that vein, apparently, as disclosed in that second hole? A. Nearly due east and west.

Q. Did you do anything over there at that second hole when you went down to see it?

A. I don't remember that I did.

Q. After that time, state whether or not you ever saw Mr. Colbert doing any work there?

A. Well, he worked around there for a number of days, but after he got that hole finished, I don't remember whether he ever done any work on it or not.

Q. After he got that hole finished, you mean the second hole? A. Yes, sir.

Q. Then that is about all you recollect in regard to this is it, Mr. Emery, your going down and seeing this first hole and afterwards seeing the second? A. Yes.

Q. You don't remember of having noticed Mr. Colbert at work there on these two holes after these two occasions?

A. Not on that ground as a ledge; he placer mined on that ground afterwards, or a portion of it.

Q. Did you see on either occasion when you were there any boundaries of any description apparently marking a quartz location?

A. I seen his location there quite a long time afterwards.

Q. About how long afterwards?

A. Well, I seen it there until way long in the fall, winter sometime, or the second winter afterwards, I would not be sure which; the last time I saw it somebody had made an application for a patent for placer purposes of the forty acres of it, and had posted their application notice right over the notice of location of Mr. Colbert in the same box, and Mr. Colbert's notice of location was still there.

Q. Where was that box?

A. Just east of the discovery, up on the bank.

Q. Can you remember anything about Colbert's notice; can you remember the name of the claim stated in it?

A. I remember it was called the Morning Star, and at the same time it called for 750 feet in each direction from the discovery shaft.

Q. Can you remember whose name was signed to that location notice? .A. Charles Colbert.

Q. Do you remember that date of that notice?

A. No.

Q. Did I understand you to say something a little while ago in regard to your helping Mr. Colbert about his notice?

A. He came over to me to write out the location notice for him which I did.

Q. Who came over after you?

A. Charles Colbert.

Q. How long after you had been down on the ground the first time was it that he came after you to go over with him? A. Well, I can't say positively about that.

Q. Did you go over there with him?

A. Well, I cannot say positively as to that, whether it was after I went down there on the ground or whether I had wrote out the location notice before I went down with him.

Q. Did you go down with him?

A. I went down to the claim, but I don't recollect for certain whether I and Mr. Colbert were together at the time or not.

Q. But you remember of going down there?

A. Yes, I remember of going down there.

Q. What did you do when you went down there?

A. Well, I looked at the hole and broke some of the ore that he had thrown out on the bank.

Q. Was that the first hole or the second?

A. That was the discovery.

Q. That is all you recollect having done, just looking at the hole, and kind of examining some of the ore strewn out on the side, that is when you went down the second time? A. That is all I recollect.

Q. At any time since then have you ever seen anybody doing anything, any work at either of these two holes?

A. I seen Mr. Kropf and Mr. McKinstry at work there.

Q. You say you saw Mr. Kropf working there?

A. Yes.

Q. About what time was it you saw him working there?

A. My impression is that it was the year after, the next year.

Q. Where was he working at the time you first saw him? A. In the discovery shaft I believe.

Q. How frequently did you see him working there? More than four or five times, in all? A. I did.

Q. When you saw him there were you simply passing by, or did you stop there?

A. I can't remember as to that; the first time I saw him there, I was down there while I was at work, I believe once; I think I knew at the time who it was working there.

Q. Can you remember what he was doing?

A. Yes.

Q. What was he doing?

A. Sinking that hole deeper.

Q. Did you see him take anything out of the hole?

A. I don't remember that I did.

Q. Can you remember about how deep it was at the time you saw him working in it?

A. Well, it occurs to me that it was down some 12 or 14 feet.

Q. You say you saw him working there about four or five times?

A. I say not to exceed four or five times.

Q. You say you saw McKinstry working there—what McKinstry was it?

A. It was Harvey McKinstry.

Q. Did you know Harvey McKinstry at that time?

A. I did.

Q. When was the first time that you saw Mr. Harvey McKinstry at work there?

A. At the time that he and Mr. Kropf were at work there.

Q. The first time you saw him at work there was when he and Mr. Kropf were together?

A. Yes, sir.

Q. Which hole were they in, or which hole were they at the first time you saw them together there?

A. At the discovery shaft.

Q. Well, how many times do you remember having seen McKinstry there in either one of these holes?

A. Well, as I said before, I don't remember of seeing him there at any time, only when Mr. Kropf was with him, for perhaps 4 or 5 times.

Q. Did you ever hear of a quartz lode claim called the "Childe Harold" quartz lode claim?

A. Yes, sir.

Q. When did you first hear of such a claim, and what were the circumstances of your hearing of it?

A. Well, the first time I knew of that claim, I was passing by there, and I seen a notice on the claim—a notice of the claim on the ground.

Q. What year was that?

A. That I would be unable to tell.

Q. Where was the notice that you saw on the "Childe Harold"?

A. The notice was at or near the discovery hole of the Morning Star.

Q. Was it after you saw McKinstry and Kropf working there together, or before, that you saw this notice?

A. It was afterwards.

Q. What was the notice attached to, this notice that you saw?

A. Well, I cannot be positive as to that, but it was on something probably that high (indicating) on the ground, a post, or a board, or a box, one or the other.

Q. Tell us all you can remember in regard to that notice?

A. Well, I simply stopped and read the notice, and I seen that the name of Harvey McKinstry was signed to the notice at the bottom.

Q. Now Mr. Emery, can you tell us anything about that notice you saw?

A. Well, as to that notice, I can't say from what I remember at the time, whether the claim ran 750 feet east or 750 west. it was nearly west of the discovery shaft.

Q. Can you remember the name given the claim in that notice? A. Yes, I remember that.

Q. What was that? A. The "Childe Harold."

Q. Do you remember the name signed to it, if any name was signed to it?

A. Harvey W. McKinstry, I believe was the name, or H. W. McKinstry, I ain't sure whether the full name was signed or not.

Q. Do you remember the date of the notice, if it contained a date? A. I can't remember it.

Q. After you saw this notice, could you recollect of

having seen the name of Harvey McKinstry upon the ground after that? A. No, I can't.

Q. Do you remember of ever having seen any points of survey on that claim, and if so, describe them?

A. I was up across it afterwards and I seen that he had made a survey, some kind of a survey on it.

Q. What led you to believe that a survey had been made on it, what did you see?

A. The character of the monuments on the ground led me to believe it.

Q. Describe what monuments you saw at that time?

A. Well, I don't remember what I seen as to that, but there was something led me to believe that there was a survey made, and there might have been a notice of application for patent on it.

Q. Well, just think a moment, and see if you cannot recollect what led you to believe that a survey had been made on it?

A. Well, I seen some corners that led me to believe that there was a survey made there. It seems to me these corners were posts set up and stone piled up on the ground: it seems to me they were posts.

Q. Can you give us any idea where these posts were located?

A. Two posts I seen were located at about the right distance from the discovery shaft, one on the north and one on the south, to conform to this description of the ground on the location.

Q. Were there any marks on them that you can remember?

A. Well, I don't remember as to that, but there was

something about them which made me believe that there had been a survey made there, surveyed for some purpose.

Q. What year do you think this was?

A. I don't recollect the year.

Q. You never saw any surveyors there at all, did you—did you ever see Mr. Ringeling there?

A. I don't remember of seeing any surveyors at the time it was surveyed, or even ever seeing Mr. Ringeling there.

Q. Well, did you ever see Mr. McKinstry there?

A. I don't remember of seeing Mr. McKinstry there, except the time when he and Mr. Kropf were there.

Q. Have you been in this locality recently?

A. Yes, I was down there Saturday last, I believe.

Q. What did you see there last Saturday?

A. Well, there are some holes sunk there, and the discovery shaft as nearly as I can locate it now, has been timbered up and is still open; and there is another hole sunk further east, apparently, as near as I can tell; there has been some building done around there, and the surface of the ground has changed considerably.

Q. How many discovery shafts or holes did you see when you were there last Saturday?

A. There are three holes on the ground now, I believe, and I am not sure but four, but if there are four, one is very small.

Q. Did you look into them?

A. Yes, I looked into them.

Q. All of them? A. Yes.

Q. What did you see?

A. Well, in what I took to be the discovery, or old discovery hole, that is timbered up, and is probably eighteen or twenty feet deep, as nearly as I could see, and it looked to me as if there was something across down below in the hole to stop the hole up—down about 15 or 20 feet; it looked that way.

Q. That was the hole that you could identify as the discovery of the Morning Star, as nearly as you could tell?

A. Yes, sir.

Q. Which hole is that now, according to the direction of the gulch that runs through now?

A. It looked to me as if the east hole was the discovery hole, but I couldn't say positively whether it was the one farthest east, or the one next west of it.

Q. About how near is that discovery hole to the one next west of it?

A. About 25 or 30 feet.

Q. How far would you say, to the best of your recollection, that any of the holes that you saw there on last Saturday were distant from the two discovery holes that you saw when you and he were down there first?

A. Well, these two holes that are there now, I think that one or the other of them is the discovery; one or the other of them is the same hole that Mr. Colbert sunk on right opposite of it; the other hole on the west bank I could recognize that by being up on the bank where nothing had disturbed it, and the locality was the same.

Q. In either of these holes you saw on Saturday, one or the other of which you took to be the original discovery shaft as Colbert first showed it to you, could you see any quartz matter, or were they timbered up so you could not see the walls?

A. I couldn't see anything in the shaft timbered up.

Q. You say that one of them was about fifteen feet deep?

A. 15 or 18 feet deep, somewhere along there.

Q. Did you look into the other to form an idea how deep that was?

A. I am not sure that I looked into the east hole, but apparently quite deep, a quite a deep hole; there was a quite a quantity of dirt thrown out on the dump; it looked as if it might have been a thirty-foot hole, hole full sized—shaft eight feet or so.

Q. You say you knew Harvey McKinstry?

A. I did know him, yes.

Q. Where is he now?

A. The Lord only knows, I don't.

Q. Well, is he alive or dead? A. He is dead.

Cross-Examination.

By *Mr. McIntire.* Q. This east hole that you speak about, is that timbered?

A. There are timbers around the top.

Q. Has it a frame over it?

A. That is the one you call the east hole, yes, sir.

Q. You say that is some 25 or 30 feet away from the original discovery hole?

A. I would say 25 or 30 feet away from where I saw the original discovery shaft first.

Q. This hole was there in 1877, when you were there?

A. Unless it was the discovery hole, it was not.

Q. You don't know what is the discovery hole that Colbert had there, do you?

A. I don't know for certain; the country has been changed a good deal, there has been some building done down there and the gulch has been partly filled up.

Q. You say that country has been built up down there, what do you mean by that?

A. Buildings erected close by and some of the country leveled up to make yards and so on.

Q. As a matter of fact there has been considerable building of one kind and another on this ground right east and south of it?

A. Yes, sir.

Q. What is the nature of the building?

A. There are frame buildings for dwelling houses.

Q. This ground takes in quite a large portion of the Montana Central ground, does it not?

A. I don't know as to that, but I should say it took in some of the ground up near the depot.

Q. Take in any tracks?

A. I would say so.

Q. It is quite valuable ground for surface purposes, is it not?

A. Well, it should be valuable for surface purposes.

Q. You say that when you saw this notice on the "Childe Harold," you saw two corner posts; what line of the "Childe Harold" did these two corner posts mark?

A. Well, at the time I first seen this notice on the "Childe Harold", I don't remember that I seen any corners at all.

Q. Didn't you just now say that you saw two corners from the discovery shaft?

A. I didn't look for them.

Q. Didn't you just now say that you saw two posts there near the discovery shaft, at the proper distance from it?

A. I said afterwards there had been apparently a survey made on it, and I saw these two posts then.

Q. What line of the claim would these two posts indicate?

A. They indicate the east end line.

Q. Now a line drawn from one of these posts to the other would be how far from this discovery shaft, and in what direction?

A. Well, it would be a few feet to the east of it, I am not sure which way it would be.

Q. This hole that you call the east hole, would that be east of this line or west of this line drawn from these two posts?

A. Well, I can hardly say as to that; in that hole there had been a good deal of work done in it since I was there. When I saw this location notice I couldn't say positively whether a line drawn between these two posts would pass east of the east hole, or between the east and the middle hole.

Q. You can't say that positively?

A. Not now.

Q. You did not observe it closely enough to tell that, did you?

A. Well, it has been a quite a while ago, and I didn't look at the posts the other day to see whether it would or not.

Q. Did you see any posts there the other day?

A. I see one post.

Q. You can not identify that post that you saw Saturday as being the one you saw there at the time you first saw the discovery? A. I did not.

Q. Did you stop to read this location notice that Mr. Clark has exhibited to you at the time you saw it?

A. I don't think I did, the form was familiar to me and I just looked at it and saw the name of the claim and that was all.

Q. You do not pretend to know what that notice called for, and you didn't know at the time, speaking from your memory?

A. Not to a certainty, only it called for fifteen hundred feet there, and H. W. McKinstry was the locator of it.

Q. You say you saw Kropf and McKinstry working there and that they were down some 12 or 15 feet; from what place did you measure that distance of 12 or 15 feet from the surface ground?

A. The surface ground is some four or five feet above the croppings where they commenced to sink, and I measured that distance from the surface.

Q. Then the rest of that 12 or 15 feet would be in the bed rock, would it?

A. Yes, they timbered it up, and there is something across, near the top—that is so as to have plenty of room for the dump.

Q. Where was the stuff that was taken out of that hole thrown—where was the dump?

A. Some of it was thrown up on the bank on the west side of it, and some of it thrown on either side of the hole and in the cut.

Q. Was there any of it on the surface of the earth?

A. The quartz was thrown, some of it, up to the surface.

Q. How large a dump was there there?

A. It is my recollection that all the quartz that was thrown out there—the most valuable portion of it, apparently—would make two or three tons.

Q. What became of that dump, do you know?

A. Well, as near as I can tell, there is some of it there yet.

Q. How much of it is there yet?

A. About one thousand pounds, maybe.

Q. Is that one thousand pounds in a pile?

A. Yes.

Q. You saw that on Saturday, did you? A. Yes.

Q. Do you remember what year it was that you saw Kropf and McKinstry working there on this ground?

A. It seems to me that it was in the fall, but I would not be sure; it was in the low water season.

Q. You don't remember the year that was in, do you?

A. No, I do not.

Q. Now, about this piece of ore that you took away, did you not say in the first part of your testimony that Colbert was with you when you got it, and that he handed it to you?

A. Mr. Colbert either handed it to me at the cabin, or I got it down at the hole, I am not sure which; he told me, if he handed it to me, that he had got it out of there, and I may have gone down afterwards, after he handed it to me; if he handed it to me I had no reason to doubt

that he got it out of the hole, judging from the character of the ore on the ground and on the dump.

Q. Did you take any ore from the dump yourself, and assay it? A. I don't remember that I did.

Q. The only piece you had was that that Colbert gave you, was it, that you took and assayed?

A. What he gave me himself, or I took from the dump, I don't know which.

Q. What reason did you have for taking that piece of ore and assaying it?

A. Well, I wanted to know what was in it, and I told him I would take it and assay it.

Q. Have you made that your business at all, assaying? A. Only for my own satisfaction.

Q. How much experience have you had in it?

A. Well, I have done more or less assaying since 1876.

Q. What kind of process did you employ in making this assay for copper?

A. I used what they call the Siende process, generally.

Q. Is that what you used at the time you made this particular assay?

A. Yes, for silver and gold I used a blowpipe analysis.

Q. From that blowpipe analysis you were only able to guess that it carried five dollars in gold, were you not?

A. Yes, from the character of the rock I had, and the quantity I took being small, it was impossible to make

any accurate estimation of the gold. I weighed the gold and silver button that I got out of the rock.

Q. You did not determine the quantity of each—the gold and the silver—at the time, did you?

A. No, sir.

Q. Then your valuation that it carried five dollars in gold is only a guess?

A. Yes, it is partly a guess. I separated the gold and silver, and guessed at the quantity of gold in it.

Q. That same statement will apply to the silver that you got—you guessed at it? A. No.

Q. How much silver did you get?

A. I don't remember now. I just got a very small quantity of silver—just enough so that I could weigh it and the gold.

Q. What did you charge Mr. Colbert for making this assay? A. I didn't charge him anything.

Q. Did you make these assays gratuitously?

A. Sometimes I did. I never charged a man anything for making an assay in my life.

Q. Your memory is so good, is it, that you can carry the value of that assay, or the assays you make, so long as you have carried this? A. Some of them I can.

Q. What was there about this assay that makes you carry the result of it for eighteen years?

A. Well, the only thing about it was, it being right close to me, and I being considerably struck with the assay at the time, I have remembered it.

Q. When was your attention last called to that assay?

A. Well, there was nobody ever called my attention to it at any time, that I remember of.

Q. Have you not been asked about that assay lately?

A. I volunteered to tell parties that I had made an assay on the ground; I told Mr. Ringeling the other day that I had made an assay on the ground.

Q. How long ago was it that you told him?

A. It was Saturday.

Q. That was the first thing that called your attention to that assay since you made it in 1876?

A. No, sir, I have thought of it at different times.

Q. What caused you to think over it?

A. Well, there are various things that happens that will bring up little things that you may call insignificant to a person's memory.

Q. What particular thing was there about this particular assay that called it to your mind on these various occasions that you have been thinking it over since 1877?

A. Well, I can't exactly explain that, but a person that lives in the world, presumably, will think of things he will wonder at himself why he does think of them.

Q. You have made assays of other ores in the neighborhood of this ground, have you not? A. Yes.

Q. These other assays were made on ores near your place? A. Yes.

Q. Have you carried the result of all those assays in your mind since you have made them, and since 1876?

A. Not all of the time, I have not.

Q. Your memory is good in regard to this one assay, and not good in regard to the others?

A. I recollect one there that I made right there; I made one right off between there and my cabin; I can tell you what the amount of that assay was.

Q. Well, never mind, did you make any other assays in the vicinity around there?

A. Yes, I have assayed the value of ore right in the Anderson lode, right near to this lode.

Q. Did you carry the result of these assays too, in your mind? A. Some of them I remember.

Q. In what year was it that you think that somebody had placed a placer application notice right over that of Mr. Colbert—over Mr. Colbert's notice?

A. Well, I cannot state positively as to that, but it was before Mr. Colbert's notice had run out and the ground had become vacant.

Q. Then as I understand it, you can not remember all of these various assays, and you cannot remember the year that you saw this notice posted over Mr. Colbert's, being there a whole year's time, wasn't it?

A. Yes.

Q. Did this notice of placer application entirely cover the Colbert notice?

A. It covered all but just a little at the bottom that could be seen.

Q. You could see some of the writing on the bottom of the Colbert notice? A. No, I think not.

Q. You recognized that the Colbert notice was there though, didn't you? A. Yes, sir.

Q. How did you recognize that if there was no writing to be seen around it?

A. There was something about the Colbert notice that I could see, and recognize that it was there.

Q. You saw no writing at the bottom of it, did you?

A. I am not quite positive whether there was any writing on it or not, or whether one notice was smaller than the other, but I could recognize that it was Colbert's notice there, something there was about it that made me recognize it.

Q. Now, you say that you saw some brown stuff in that second hole that Colbert had there; did you assay that, too? A. No.

Q. Why not?

A. At that time I had no occasion to make an assay of it.

Q. You were not in the assay business right at that time in regard to that particular ore, were you?

A. Well, at that time I had curiosity enough about me to want to know what was in that ore at the first discovery.

Q. How much of that brown stuff was there about that first hole at the time you saw it?

A. Not a great quantity of it, there was a kind of a casing or ledge matter of different kinds between the body of ore and the walls, and it was a kind of brownish colored stuff.

Q. Did you assay any of that stuff? A. No.

Q. You only assayed the green stuff, did you?

A. The only assay I made was the one I spoke of.

Q. How much of that green stuff was there in the second hole?

A. There was none that you may call green ore—there was green spots in it.

Q. What was the metal-bearing matter that you saw in the vein of the discovery?

A. The metal-bearing portion of it was the green—that is the part that was metal-bearing.

Q. Well, did you know that that brown stuff carried any metal?

A. No, I didn't think anything carried metal at all until I assayed it.

Q. You say you were down to these holes the second time in the first year that you saw them; why did you go there the second time—that was, when you saw that west hole that Mr. Colbert was working in?

A. Yes, sir, I was there; I was living close by there and doing nothing a good deal of the time; after the placer mining season closed I had nothing to do from that until spring unless it was prospecting, and I would frequently go over to where Mr. Colbert was, or over to his cabin.

Q. Was he working there in that hole, the west hole, when you were there the second time?

A. Yes.

Q. What year was that in?

A. It seems to me it was in the fall, in the fall of the year, September, October, or November.

Q. You would call November, also, a part of the fall, would you? A. Yes.

Q. You would not call any other month a part of the fall would you, Mr. Emery?

A. No, I guess not; scientists place the fall a little bit different from what I have.

Q. What do you call the fall?

A. September, October, and November.

Q. You would not call any other month the fall?

A. I would not call December a fall month.

Q. Then, it was either in the month of September, October, or November that you saw Mr. Colbert working on this second hole?

A. To the best of my memory it was in the fall following the location.

Q. It was not in any other month than either of these months that you have mentioned, was it?

A. I don't think it was in December.

Q. At what time of the year did you see him working on that first hole?

A. At the time he made the location; I don't remember, but it was soon after the close of the placer mining season, I don't remember, that I saw them at that hole when he was working there.

Q. Now, the second time that you went down there and saw this hole to the west, did you notice that first hole that you had seen earlier in the year?

A. Yes, I was at it too.

Q. With reference to the depth it had when you first saw it, how did it compare at the second time you saw it?

A. The second time that I saw it I think it was seven or eight feet below the bed rock.

Q. It had been dug down deeper, then?

A. Yes, sir.

Q. That was also dug during the month of November, wasn't it?

A. Most of it was dug about the time of the discovery.

Q. You say this cropping of ore matter was above the granite bed rock?

A. It cropped right out up to the top and ran out over a little bit.

Q. It was in the fall that this hole had been sunk that you speak of then, the discovery, was it?

A. Yes.

Q. Did I understand you to say that you made out a notice for Charles Colbert for that location?

A. I wrote out a location notice for him.

Q. You never went under the name of "Wiles," did you? A. No, sir.

Q. Then if Mr. Colbert stated yesterday that Wiles made out the notice for him, he was mistaken, was he?

A. Wiles may have made out a notice for record.

Q. Did you hear Charley Colbert testify yesterday?

A. I heard a little of it.

Q. Did you not hear him testify that a certain paper that he produced in evidence was the location notice on the Morning Star? A. No, I did not.

Q. You didn't hear him testify then that that was the location notice that was stuck up on this discovery, and was a copy of the notice that was recorded, and that it was made out by Mr. Wiles? A. No, sir.

Q. You did not hear him testify that the one he stuck up on the discovery was your handiwork?

A. I don't remember that; all I know is, I made out a notice for him.

Q. What is the character of the ground around this hole you have testified to?

A. The character of the ground is pretty near level, with little ravines running through it from north to south.

Q. From a miner's standpoint, what would you call that ground down there? A. Placer ground.

Q. There are a quite a number of holes, ravines, gulleys and channels around there yet? A. Yes.

Q. And these holes, ravines, gulleys and channels have existed there for a quite a number of years, haven't they?

A. Well, the ravines have existed there a good while.

Q. These are not the ravines you spoke of?

A. Yes.

Q. Well, evidences of man's hand work are quite numerous there, are they not?

A. Yes, they have been there since 1875 and 1876.

Q. They consist of these channels, holes and cuts through there, don't they? A. Yes.

Q. The ground is broken up quite a good deal?

A. A good deal, quite a number of cuts cut in, and quite a number of ditches worked out.

Q. How long did you mine there?

A. For fourteen years within a short distance of that ground.

Q. That is valuable placer mining ground, isn't it?

A. Yes.

Q. And had been worked considerably?

A. Yes.

Q. You, yourself, worked ground around there, did you not?

A. I did, yes, sir, I mined and worked at it while I was down there.

Q. And this placer work was all around these holes, wasn't it?

A. Well, there was some work done down below, only a little of it, the most of the work was done up above.

Q. In fact most of the ground down there in South Butte has been worked as placer mines, hasn't it?

A. Yes.

Q. It was actually worked in 1877 and 1878, wasn't it, the same season that Mr. Colbert made this location on the quartz claim that he made this cut through there and cleaned it up for the purpose of mining some place?

A. Yes.

Q. And there was other placer mining around there by other persons besides Mr. Colbert, wasn't there?

A. I was mining there, and I am not sure, but I think Mr. Tong was mining there to the east of Mr. Colbert; I was mining east of him.

Q. Was there anybody mining west of Colbert?

A. Well, Hickey was mining this way.

Q. What do you call "this way"?

A. West and northwest.

Redirect Examination.

By *Mr. Clark*. Q. You say that you assayed some samples of ore taken from a claim called the "Anderson" in that vicinity, did you not?

A. Yes, sir, but it was not called the "Anderson" when I took it.

Q. What was it called?

A. It was not located at all; a gentleman by the

name of Buttler lived in there and owned some ground that I bought afterwards.

Q. Is that the ground that you are referring to when, in answer to Mr. McIntire, you said you made an assay on some ground near the Anderson claim?

A. Yes, that is the Anderson ground now, and that is the ground that I referred to at the time I made this answer.

Q. Where was the ground with reference to the discovery holes of the Morning Star?

Mr. McIntire. I object to this on the ground that it is immaterial and incompetent, and as not bearing at all upon the question in controversy in this action.

Q. Well, the ground that you assayed from is about from fifteen to eighteen hundred feet in a northeasterly direction from the discovery of the Morning Star?

A. Yes.

Q. Where did you get these samples that you assayed of that ground?

A. Mr. Buttler brought one sample to me.

Q. Did you make an assay of it?

A. Yes, for silver only, silver and gold.

Q. Do you remember what the result of that assay was?

A. The result of that assay was about 14 ounces.

Q. Say yes or no to my question. A. Yes.

Q. State, as nearly as you can remember, what the result of that assay was?

Mr. McIntire. We object to that question on the ground that that assay was made upon a piece of ground fifteen or eighteen hundred feet away from the ground

in controversy, and is not contended to prove the existence of ore in the ground now in dispute.

A. The result of that assay was about 14 ounces to the ton in silver—a very small amount of gold.

Q. You say there has been considerable building done in that neighborhood since you were there first?

A. Yes, sir.

Q. Well, where has that building been done with reference to the discovery holes that you saw when Colbert took you down there first?

A. Right to the east and south, and southeast.

Q. Are there any buildings on the ground, or in the immediate vicinity of the ground upon which the discovery hole or shaft is, which you say you saw last Saturday?

A. Right within, I would think within one hundred feet, or about that, to the east, there is a house, and I don't think it is over one hundred feet south to another house.

Q. Well, how about the ground towards the west, is that covered with buildings?

A. The ground towards the west is.

Q. Which one of the present shafts or holes that you saw on that ground last Saturday is nearest, to the best of your recollection, to the two holes there was there on the occasion that Mr. Colbert first took you on the ground?

A. Well, to the best of my recollection, what I call the middle hole, and down in the gulch is the discovery hole.

Q. You think that is the discovery?

A. Yes, that is what I took for the discovery, by the appearance there now.

Q. Did you know at the time you first went down there to this ground with Mr. Colbert whether the ground where these two discovery holes were, was public ground, or otherwise?

A. When Colbert claimed the ground, I thought it was public ground, I thought Colbert—

Q. Never mind that; did you have any personal knowledge of whether the ground in the immediate vicinity of these two holes was public ground, or otherwise, of your own knowledge?

A. Well, about that I will say no.

Q. This ground is not very much built over, is it now?

A. It is pretty vacant now; it is only a little to the east and south it has buildings on, but that is pretty close up there.

Q. There is not much difference between the nature of the ground now and the way it was eighteen years ago, excepting time, is there?

A. The gulch is filled up by the dump at one of these shafts or the road crossings, or something like that. There is no road crossing there, but right south they have built a road, that is built over across the old channel where the gulch runs through, and of course the gulch is filled up, so that really I couldn't tell where the discovery was on account of the gulch being filled up.

Recross-Examination.

By *Mr. McIntire*. Q. You say that to the west of these holes the ground is open?

A. Yes, close by there it is open.

Q. Do you not know that as a matter of fact to the west of these holes there is a large building called the "Tiling Works"?

A. Well, yes, quite a ways to the west of that.

Q. Well, that is in the limits of this claim, isn't it?

A. Well, if it is, it is away west near the Montana Central depot.

Q. Do you not know that the Montana Central buildings are within the limits of this claim?

A. Some of them are.

Q. And that some of the tracks are also within the limits of this claim?

A. Some of the tracks are also towards the north and northwest end.

WESLEY P. EMERY.

Subscribed and sworn to before me this 2d day of February, A. D. 1895.

[SEAL.]

CHARLES F. ROE,
Notary Public.

George H. Tong, after being duly sworn on the part of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. You live in Butte, do you ?

A. Yes, sir.

Q. How long have you lived here ?

A. I came here in 1875.

Q. What has been your occupation since you came here in 1875 ?

A. Mining.

Q. Been engaged in that business constantly ?

A. Yes, all the while.

Q. Do you know Charles Colbert ?

A. Yes, sir.

Q. When did you first make his acquaintance ?

A. In the fall of 1876.

Q. Did you ever hear of a quartz lode claim called the Morning Star ?

A. Yes, sir; well, I am not going to say yes or no; that has been so plagued long ago, this thing you are going to come to, Emery going to write the notice, and I declare I don't know whether it was on the Morning Star or what it was; I have got a good, distinct memory, but that is a little too far back; I wrote a notice.

Q. You say you saw a notice ?

A. Yes, sir.

Q. Where did you see that notice, and when ?

A. Well, I am not going to tell the exact year, but I think it was 1877, or else it was in 1878, but which one of these two years now I cannot tell you; I worked down there at the time, and I think I worked there three years.

Q. What was the nature of the work you were doing ?

A. Placering in the piece of ground right east of Mr. Emery; Charley Colbert is right here; here is Colbert, and here is Emery, and here is Tong.

Q. What part of the Butte townsite is that located in? A. It is out of the townsite.

Q. Where is it with reference to Butte?

A. It is right from a B line; it is right straight from here to the Parrot; it is just about straight from here to there, on a B line.

Q. Do you know anything about Mr. Colbert's having a quartz claim in that locality down there, that you have just described? Describe what you know about it, as nearly as you can recollect it.

A. I never saw Charley Colbert's quartz claim. One place he had a windlass up there, and there were two men working there, and that was along, say in September or October, after we had quit work on the placer mining. There was two men working there. One of them was a fellow that Charley Colbert had working for him in the placer mining. He was a German or some foreigner. The other fellow I did not know, but accidentally I went there, and the windlass stood there, and I went over one day and seen it, and the only time I was ever there in my life, where these men worked out, and it was right in the bedrock—right down to the bedrock. It had been washed out by water that was used in Charley Colbert's cut. That is a place for a tailrace.

Q. Do you remember any such location as the Parrot gulch in that neighborhood?

A. No: of course I heard of the Parrot gulch, but I don't remember much when that was.

Q. Well, now, can you give us any idea of the location of this windlass that you saw on that occasion when

you went there, with reference to any surrounding landmarks at all?

A. There wasn't any landmarks. It was just a perfect flat. There was no houses down there, except our three. That was the last houses in the bunch, but there was one house below there, just about straight below Mr. Emery's house. His name was Marsdon, or some such name.

Q. You say that there was a tailrace there that Charley Colbert used?

A. Yes, sir.

Q. You say he was using this tailrace, do you?

A. Yes, the water went through it.

Q. This windlass was right on the tailrace, you say?

A. Yes.

Q. You knew where Charley Colbert lived at that time, did you not?

A. Yes, sir, I was there, over there two or three times.

Q. Where was this point where the windlass was located with reference to Charley Colbert's cabin?

A. Well, it was, I should judge, eight hundred feet straight south and if anything a little east.

Q. Well, did you go over to the windlass at any time?

A. I was there once, that is the only time I was ever there.

Q. What did you see over there?

A. When I was there the other day, a hole down, I think, ten feet deep, that is below the bed rock, I don't believe it was ten feet deep, I should say eight.

Q. About how deep was the cut?

A. About five or six, about as deep as a man's head.

Q. And the hole was about ten feet deep below the bed rock?

A. Yes, it was not any more than that.

Q. How big was it on the surface, could you tell?

A. No, they had a hole there something like five feet square, something like that.

Q. Who was in the hole when you went there?

A. Plagued if I know who was in the hole; the fellow that was windlassing was a German, or some foreigner.

Q. Was Colbert there himself?

A. No. These two men were working in the hole and the other fellow windlassing were all the men I saw there; I never saw them working with Colbert, although Charley used to tell me about his lead. I used to be over there once in a while, we was not doing nothing in the placer mining at the time.

Q. Did you look into the hole at the time you were there? A. Yes, sir.

Q. What did you see there?

A. I would think that the hole was about five feet deep, or about six feet, and it was awful close to square; there was a kind of a barren quartz in that hole, the same as there is all over down there.

Q. Was it quartz? A. Yes.

Q. What color was it?

A. It was a kind of a brown.

Q. Did you say you were a mining man and had been in that business a number of years? A. Yes, sir.

Q. Did you see any vein in that hole, anything that looked like a vein?

A. Well, that was in it, this apparent quartz; there was something in it, I never tried the bedrock, it just looked just like all this top ore down in that country, in those days we didn't think it was worth a cent.

Q. Well, everybody in those days were engaged in placer mining?

A. Yes, they were; if we had known anything about quartz mining we would have been fixed long ago, all of us.

Q. You think that quartz mining would have been a good thing at that time, do you?

A. Yes, I do; but I had enough of quartz mining; I had a lease of quartz ore, but there was no money in it; they charged me twenty-five dollars for working, and then never gave you enough, gave you nothing for what was in your ore.

Q. At the time you were there when these men were working that windlass, did you see any other hole there?

A. There was no hole there, there was another hole a little bit east that was not over two feet deep.

Q. That was a little bit east of the hole with the windlass, was it?

A. Yes, about fifty feet or seventy-five.

Q. Just think that matter over just a minute, Mr. Tong, and then give us the direction of that second hole you saw from the first one?

A. That was right straight west of the one in the gulch, come to think of it.

Q. You stated first that it was east?

A. I meant west.

Q. About how many feet west of where they were working?

A. Well, it was, I would just guess at it, 75 feet, it was not over two feet deep; some fellow had dug it out in a half an hour, but I didn't see anything in it.

Q. From what you saw of the vein matter when you saw this first hole, can you form any idea of the direction of that vein?

A. Well, I could form no idea from anything in these two holes.

Q. Did you see any indication of any vein having been uncovered in the second hole, or small hole?

A. Well, there is the same kind of ore in the second hole that there was in the first.

Q. Can you tell how wide the vein appeared to you in either hole?

A. Well, of course, in this west hole there was not enough done there to tell anything; but in this place where these fellows were working, there was no sides or anything to it, they all looked alike, and as if it might be ten or twenty feet wide, so far as that went.

Q. You did not go down into that first hole, did you?

A. No, I just stood up by the windlass and talked to the fellow that was there; I knew the fellow that was windlassing; he worked for old Charley that summer.

Q. Did you see any quartz indications at or near the surface at that place? A. No.

Q. In this little hole out here, what was in that?

A. The same kind of ore they were taking out down in this other hole—there was no dirt on top of this cut;

there was no dirt on this cut at all; that was washed off slick and clean down to the bed rock, and the chances are that it was washed down a couple of feet down into it; the bed rock was soft on top.

Q. Did you see any green ore in that first hole or in the cut?

A. I would not say that I did see any that was green; that was kind of brown rock—of course, there may have been some green in it.

Q. You do not know whether there was any in it or not?

A. No, I don't; I don't know, of course, now, whether it had any in it.

Q. When you went along past the quartz hole, then you just took a look into it?

A. When we went along past the quartz hole, then we just took a look into it, and we didn't take enough notice of it to tell whether it was green, black or blue.

Q. At that hole where the windlass was, did you see any notice or paper of any kind?

A. Yes, there was a notice up there.

Q. Did you read it?

A. I believe I read it—part of it—but I cannot tell for certain.

Q. Can you remember anything about it?

A. No, not a thing—I don't know the name, even.

Q. But you remember of seeing a paper there of some kind? A. Yes, there was a notice there.

Q. What was that notice on?

A. This notice was on a board—that original notice,

and then the board was nailed on a post, but how big the post was, or anything like that, I could not say.

Q. Do you remember of seeing Mr. Kropf working there at that hole where the windlass was afterwards?

A. No, not Kropf; these men were working there, and somebody. I never was there to that hole only that once in my life.

Q. How many times did you see anybody working there after you were there the first time?

A. Oh, I can't tell, I can't really tell anything about that, although they were working there for somewhere about two or three or four weeks, but the fellows who were working there didn't know anything more about working than anything on earth; they would not sink a hole ten feet in a month.

Q. Did you notice them at work there for three or four weeks?

A. Yes; they were working there in the hole.

Q. Do you remember what this notice or paper that you saw was about?

A. No, I couldn't say that, only a location, only the location part; but what it read, or anything like that, I don't remember, and yet I read part of it, but I don't honestly believe that I read all of it.

Q. You have no recollection of what it was about?

A. I have no recollection as to the name of the claim or anything like that.

Q. Have you been down in that neighborhood lately, Mr. Tong?

A. Yes, I was down there, well, a week or three

days ago ; I think it was Monday, in fact, I know it was Monday.

Q. Did you at that time see anything there ?

A. Only the country has changed around there a whole lot, the whole business has filled up, to a certain extent.

Q. Did you see any holes in the ground when you were down there on Monday ?

A. Yes, there are some holes ; there are some new holes there ; there is a hole to the east that has a quite a little bit of a windlass frame over it ; somebody has sunk the hole.

Q. How many holes did you see down there the last time you were down? A. I only seen three.

Q. Where were these holes that you saw when you were down there the other day, as nearly as you can remember, with reference to the hole that you saw these men working in where this windlass was the first time you were down there?

A. Where this windlass was there is a little hole.

Q. Can you locate the place now that that windlass was on?

A. Yes, that was right in a hole that has been filled up, of course now, quite a little. You have got a shaft there fifteen or twenty feet deep curbed up and timbered up.

Q. That is a small shaft, isn't it?

A. Yes, that is the middle shaft.

Q. You don't remember Mr. Tong, after you saw these men working there, of ever having seen anybody else working in that hole?

A. No. There was never any mining done there; I never was there any more until the next spring.

Cross-Examination.

By *Mr. McIntire*. Q. You say that on Monday you saw those holes there?

A. Yes, sir, I was down there last Monday.

Q. And that one of them was timbered up?

A. Yes, two of them curbed up, and the other one, that is the one west, I would think now it is sunk down about twelve feet, and I really think that that ought to be just exactly where that little hole was that was about two feet deep at the time I first was there.

Q. Well, that hole is covered over with boards, isn't it?

A. No.

Q. Nothing over it at all?

A. No.

Q. Is it timbered in any way?

A. Not a bit.

Q. How wide is it?

A. About ten feet wide on top each way and runs down pretty near to a point.

Q. You say there is a shaft or hole with a windlass frame over it down there?

A. Yes, over east.

Q. That is east of that, if I understand you correctly, is the hole that you saw these men working in, or west of the gallows frame?

A. These two men worked on the west of the gallows frame—until I went down there Monday, I have not been down there for five years, you see.

Q. This hole that has the gallows frame over it is not the hole where these men were working when you were first down there?

A. No, I don't think it is.

Q. Now, how far west of this gallows frame hole is the hole that you saw these men working in, just approximately?

A. About forty feet, something like that.

Q. Now as to the hole timbered up?

A. It has just a few square sets in it; no, it has a few good timbers in it with square sets in it.

Q. Is it curbed?

A. Yes, it is lagged on the outside with planks, and it is about, I should think, twenty feet deep.

Q. Is that covered over at all?

A. No, there is a windlass frame on it.

Q. How high is that windlass frame from the top of the timbering?

A. It sets right on the timbers, just about level with the old natural ground there now.

Q. This notice that you say was stuck up on the windlass-hole where the two men were working, did you say was nailed on a board?

A. Yes, that is, I think it was a board, it was a board something like a 10 by 14; something like that.

Q. And that board was nailed to the post was it?

A. It was nailed on to some kind of a post, I don't know what it was.

Q. This notice was not in a box, was it?

A. The only one that I seen was not in a box.

Q. You say that these men were working in a spot in the bottom of a hole that might have been 25 feet deep?

A. Yes, there was no sides to it or anything like

that, it looked like what I would call this barren quartz, gray quartz.

Q. You call that barren stuff, do you?

A. Barren gray quartz, that is what I call it; it was barren in the bottom of that hole, and it was so on top.

Q. You say that in those days you were charged twenty-five dollars, what do you mean by that?

A. We had to pay twenty-five dollars for getting a ton of ore worked.

Q. What do you mean by "worked"?

A. At the smelter; we took it over to the smelter and they charged us twenty-five dollars for working and gave us eighty or eighty-five per cent, which ever they thought best.

Q. There was a good deal of that stuff that you saw in this hole down there at the time? A. Yes, sir.

Redirect Examination.

By *Mr. Clark*. Q. If I understand you, you say that the west hole that you saw the other day, the hole farthest west that is not boarded up there, you say that is the same place that you saw the little hole?

A. Yes, I believe that it is the same hole, it is about 75 feet or mightly close to it, west of this hole in that gulch.

Recross-Examination.

By *Mr. McIntire*. Q. That is the hole that you say has the windlass frame over it?

A. Yes, sir.

Q. And which you think was the hole where these two men were working? A. Yes.

Q. How deep is that hole now?

A. About 20 feet.

Q. You saw the bottom of it? A. Yes, sir.

Q. Any water in it? A. No, sir.

Re-redirect Examination.

By *Mr. Clark*. Q. Which hole that you saw the other day when you were down there would you think it was that was the closest hole to where you saw these men working?

A. I say these men were working in the middle hole—the one that is in the gulch now, over here (indicating) where this little windlass frame is. Of course that might have been filled up. There is a quite a little bit of dirt out there. This hole that has got the gallows frame on the location looks like the hole near the discovery.

Q. You say this is about how deep?

A. Twenty feet.

Q. Is that timbered up? A. Yes.

Q. When you looked into it the other day could you see the bottom?

A. Well, no; I thought these fellows had been trying to prospect, and I think they have gone and filled it up with dirt after lagging down about ten or fifteen feet. You can see the dirt in the bottom.

GEO. H. TONG.

Subscribed and sworn to before me this 14th day of March, A. D. 1895.

CHARLES F. ROE,
Notary Public.

George W. Newkirk, after being duly sworn on the part of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. Do you live in the city of Butte?

A. Yes, sir.

Q. How long have you lived in Butte?

A. 30 years.

Q. What has been your business or occupation since you have lived in Butte?

A. Well, different kinds of work; I have mined some, been in business some—saloon business.

Q. Were you ever engaged in mining in the neighborhood of, and south of Butte, and southeast of Butte?

A. Nothing but placer mining.

Q. Do you know Charles Colbert? A. Yes, sir.

Q. When did you first make his acquaintance?

A. Well, I think about 1867, when I first met him.

Q. Did you know him in 1878, 1877, or 1879?

A. In 1878 I knew him.

Q. Now, state, *Mr. Newkirk*, particularly, if anything, what you know about any quartz claim that you knew nothing about in 1877 or 1878 in the locality of South Butte, to the south or east of Butte, that Charles Colbert had any connection with, if you know anything in regard to it?

A. Well, about that, I know in regard to that ground that I presume you are speaking about; all that I know about that is, that I first took notice of that in 1878, I think, some time along in the spring, in the spring

months; I have been over the ground several times since that, but to locate this very lode, I don't know now that I could go to it; it has been a quite a number of years since I have been over that section of ground.

Q. Well, what did you see in 1878, if anything?

A. Well, I met Charley Colbert there at what they call the discovery.

Q. How did you happen to meet him there?

A. Just accidentally, I used to go over that ground a good deal; I placer mined west of him a good many years, and I met him there at times at what I call the discovery; it was a small prospecting hole and I didn't take any particular notice of this shaft, or prospect hole, or whatever you might call it, any more than I saw some green ore there, or stains, what I would call stained ore.

Q. Where was that place where you saw that hole, locate it with reference to any land mark that you can give in that neighborhood?

A. Well, it is east of here, south and east down near the Parrot gulch.

Q. Did you know where the Parrot gulch was down in that neighborhood? A. Yes, sir.

Q. Where was that hole with reference to the Parrot gulch?

A. Well, I cannot tell exactly, but I should judge one hundred or two hundred feet east of it.

Q. Which direction do you call east?

A. I should say west of it, west of the Parrot gulch.

Q. Did you know where Charles Colbert lived at that time? A. Yes, sir.

Q. Did you know where his cabin was?

A. Yes, sir.

Q. Where was this hole with reference to Charles Colbert's cabin?

A. Well, I can't say positively, but I think that his cabin was east of this hole; where he lived there were two cabins right together; I think Emery lived in one and Colbert lived in the other; they were very close together.

Q. They were small cabins? A. Yes, sir.

Q. Describe what sort of a hole it was, and what you saw there?

A. Well, I saw a hole there probably seven feet long, and perhaps three feet or four feet wide.

Q. And how deep?

A. I don't think it was over eight or nine feet, I didn't take particular notice of it.

Q. Did Colbert work there at that time?

A. Yes, well, he did not work at the time I was talking to him, he stood there at the shaft, or this hole, whatever it was.

Q. Did you see anything in the hole?

A. No, I didn't notice anything particularly, only just what I noticed on the outside, what was thrown out.

Q. How much stuff was there thrown out on the outside at that time, as nearly as you can remember?

A. I don't know how much would come out of that sized hole, I don't know how much it would be.

Q. What was the appearance, what did it look like?

A. There was some green stained ore, and some brownish colored stuff.

Q. Was it dirt, fine dirt, or gravel, or chunks, or what?

A. Well, I saw nothing there that could be large chunks, of course it was small pieces, rather fine.

Q. Was there any windlass or any superstructure on this hole at that time?

A. No, sir.

Q. That is all you saw there?

A. That is all that I know of.

Q. Did you see Colbert working at that hole at any time afterwards?

A. I never paid any attention to it afterwards, I used to go over the ground a good deal, all over that country, but I never paid any particular attention to it.

Q. At that time did you have any conversation with Mr. Charles Colbert?

A. Well, not more than to ask him if it was located, if that ground was located.

Q. Just give us the conversation, briefly, as you recollect the conversation, if any, with him with reference to the quartz lode location or vein?

Mr. McIntire. I object to any conversation that he had with Mr. Colbert as hearsay, irrelevant, immaterial, and incompetent in the present action.

A. All that I remember, it has been so long ago it is pretty hard to remember all, but I asked him in regard to this hole that he was sinking; I asked him if the ground was located, and he said it was; I told him that I thought it looked like a good piece of property from what I saw of the quartz.

Q. Did you see any notice of any kind around there?

A. I don't recollect of seeing anything else than what I have related.

Q. That was about all the conversation you had with him in regard to this property ?

A. That is about all the conversation I had with him, about all that I know of, that I can remember.

Cross-Examination.

By *Mr. McIntire.* Q. Then you think that was in the spring of 1878 ?

A. Yes, sir.

Q. How do you fix the year, Mr. Newkirk ?

A. Well, I lived here all the time.

Q. I mean that particular year, how do you fix that ?

A. I don't know that I fixed it particularly.

Q. Wasn't it in the spring of 1879 ?

A. In the spring of 1879 I was over it.

Q. Was this not in the spring of 1879 instead of 1878 ?

A. No, I think not.

Q. Was it not in the spring of 1877 ?

A. Well, possibly, it might have been in the spring of 1887.

Q. May it not possibly have been in 1879, also ?

A. No, I think not.

Q. You don't think it could have been in 1879 then ?

A. No.

Q. You say that you were placer mining just to the west of this place, were you at that time ?

A. Yes, I was doing a good deal of placer mining to the west of it.

Q. How near to this hole or property ?

A. I don't know, several hundred feet.

Q. The ground all around this hole was placer ground, wasn't it? A. Yes.

Q. And it has been worked as such, hasn't it?

A. Above it, yes.

Q. And was Tong working placer then?

A. Yes.

Redirect Examination.

By *Mr. Clark*. Q. Was the ground there at that hole being worked as placer ground?

A. Well, I don't know right there, but up above it was being mined as placer ground.

(Signed) GEORGE W. NEWKIRK.

Subscribed and sworn to before me, this 15th day of February, A. D. 1895.

CHARLES F. ROE,
Notary Public.

John Woolbater, after being duly sworn on the part of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. Where do you live? ...

A. In Butte, Silver Bow county, Montana.

Q. How long have you lived here?

A. I have been here off and on since 1879.

Q. You came here in 1879, did you?

A. Yes, sir.

Q. What was your occupation in 1879, when you came here? A. Prospecting.

Q. Mining? A. Yes, sir.

Q. In 1879, when you came here to Butte, did you

know a location in the vicinity of Butte known as the Parrot gulch? A. Yes, sir.

Q. When was it located?

A. Well, the Parrot gulch was there about—well, since I remember—about one thousand feet this side of the Parrot smelter, running from Park street down, running from north to south, southerly. I would not say exactly.

Q. Was the Parrot smelter there at that time?

A. It had been built, a part of it.

Q. In the year of 1879 what business did you follow?

A. Prospecting.

Q. Were you prospecting in that locality?

A. In that locality, all around there, everywhere.

Q. Now, in 1879, state whether or not you ever saw anything in that particular vicinity down there, near the Parrot gulch or locality, which led you to believe that there was a quartz location there? A. Yes, sir.

Q. Go on and describe what you saw there which gave you that idea.

A. I was around there near, and so far as I remember I was running the country all around there looking for quartz, and at the same time placer, and I want to say about between one hundred and two hundred feet from the Parrot smelter, in a westerly direction from it, and I saw a hole in the ground, with green ore thrown out on top, and that took my attention at that very time; I thought that looked very well.

Q. Was anybody there when you first saw it.

A. No.

Q. Describe that hole as well you can.

A. Well, there was a hole there, I would say from 4 to 5 feet by 6 or 7 feet.

Q. Are those dimensions the bottom or on the surface?

A. That is on the surface—wide, that was—and so far as I know, I think it was ten feet—well, I couldn't really say how deep it was, because there was water in the hole at the time.

Q. Was there in that locality, or did you see in that locality, or near there, a cut of any description?

A. Yes.

Q. Well, describe that.

A. There was a cut there, the way I put it up; it was for placer mining purposes, to get what they call a tailrace to work the ground up to bed rock, so as to run the tailings through that cut.

Q. Where was this hole that you saw with reference to this cut for tailings?

A. It was just about right in the cut, but a little bit off of it, about west, I may say, and that hole was right in the cut, something like that.

Q. Was there anything on that hole—any structure of any kind?

A. There was a post there.

Q. Well, did you see anything else there except the post?

A. In 1879 I did not.

Q. At your first visit to the hole you did not see anything but the post and the hole?

A. No, sir.

Q. You say there was green ore on the surface?

A. Yes.

Q. How much of it?

A. Well, I would say six, seven, or eight, or ten

tons, I could not judge exactly, because it was lying all around the hole; I don't know, it was in that cut there, but I seen the green ore all around thrown some one side and some the other.

Q. Was that ore fine in the form of dirt?

A. No, it was regular quartz; some of it fine, and some not so fine.

Q. Did you look into the hole? A. I did.

Q. What did you see in the hole, if anything?

A. Dirt below, and I see a lead running right through the hole, what I would call a lead.

Q. What would you call a lead?

A. A lead is what I call, in a mineral country, country rock and mineral-bearing quartz.

Q. How wide was that lead?

A. It was about four or five feet.

Q. Can you remember whether or not the walls of the lead was covered so that you could see them at that time? A. I see one wall, smooth wall.

Q. Which one do you remember?

A. The foot wall.

Q. About how wide would you say that lead was?

A. Four or five feet.

Q. What was its appearance as to color?

A. Well, about two feet of what I would call green ore, and the balance was kind of brownish, yellow ore.

Q. Did you make any further or closer examination of the rock on the surface at that time?

A. No, sir.

Q. Did you see at this time any other holes, or at this time when you first saw that hole there?

A. No.

Q. Well, did you ever visit that place afterwards at any time?

A. Well, I left that time after I got through here, and I came back here in 1881.

Q. Well, after you got back here in 1881, did you ever visit that place again?

A. Well, I looked all around the country, and I ran over that again, too, because I wanted to see it.

Q. You went there again in 1881, did you?

A. Yes, sir.

Q. What did you see when you went there the second time in 1881?

A. Well, I saw some ore on the dump, more than there was in 1879; there was, maybe, eight or nine or ten tons on the dump, all around.

Q. Can you recollect as to the depth of this hole, whether it was any deeper or shallower than it was when you saw it in 1879?

A. It was deeper.

Q. Can you tell about how much deeper?

A. I cannot tell how much, there was water in it.

Q. Was there water in it then?

A. Just so I couldn't see the bottom.

Q. When you were there the second time in 1881, how much deeper was it to the bottom, down to where the water was?

A. About 12 feet.

Q. Was it timbered at that time?

A. No, sir.

Q. Did you see what was there on the occasion of your first visit—did you see that lead which was there

on the occasion of your first visit when you went there the second time in 1881?

A. The same that was there in 1879.

Q. Did you see any excavations on the occasion of your second visit in that locality?

A. Yes, I seen another hole.

Q. In which direction was that from the first one?

A. About 75 to 90 feet in a westerly direction.

Q. Did you go to look at that hole? A. I did.

Q. Describe that.

A. It is a hole what I would call, I didn't see any walls in that hole, I saw a lead there partly I called it, lead matter which was brown looking ore, I think it had ledge matter in it.

Q. How deep was that second hole you saw?

A. I think about 7 or 8 or 9 feet.

Q. How large on the surface?

A. Well, it was just about the same as the other, I should judge, may be, say 5 by 7, something like that.

Q. Was there anything on the surface part of the hole?

A. The ore, of course, what they had thrown out, it was lying on top of the ground.

Q. How much was there of it?

A. Well, I would say four or five or six tons.

Q. Do you recollect whether, from what you saw of this ore and other matter in that second hole, you could form any idea what was the direction of the vein or lead?

A. Yes.

Q. What was its direction?

A. Easterly and westerly.

Q. Well, that is all you saw on the occasion of your second visit made in 1881? A. Yes, sir.

Q. Now, since that time have you been there, and if so and you have ever seen anything, state what you have seen since 1881?

A. I have been there since 1881 at different times prospecting, and in 1882 I was working there in the brickyard making brick about eight hundred feet north of it, all one summer and fall and winter.

Q. Well, while you were employed in that brickyard in 1882, did you ever see these same people you first saw there? A. Yes, I see parties there often.

Q. Did you notice them there in going to your work and going to your house?

A. No, not during the time I was making brick, but after I got through making brick, I was working at the Parrot smelter, and then I passed there in going to work and coming from work at the Parrot smelter; that ground was right on my road.

Q. Was there a road or trail there?

A. It was a kind of a road that they made hauling brick from the brickyard.

Q. How near was that trail to this hole that you first saw? A. I think about 20 or 25 feet.

Q. How many times a day did you pass along this road? A. Twice a day.

Q. Did you ever see anybody working there?

A. No, sir.

Q. At that time in the year 1882?

A. No, sir.

Q. Are you acquainted with one Harvey McKinstry—were you acquainted with him?

A. I am not acquainted with the man; I see his name once; I wanted to take the ground myself in 1882, and I inquired if that ground was open for relocation, I asked Colbert there, and he told me nothing more than what I told you.

Q. Did you locate it? A. I did not.

Q. Well, after 1882, or during 1882, did you ever see anybody on that ground, or anything on that ground from which you gained the belief that that ground had been located by anyone? A. Yes, sir.

Q. What did you see, and when?

A. One day when I came from work home, it was the second or first day of January, in 1883, I saw a location notice on that very ground.

Q. Where was the location notice when you saw it?

A. It was right at the old discovery hole on the Morning Star.

Q. When you first saw this hole, the first time you were ever on the ground, state whether or not you knew what location, if any location, was made there?

A. All I know is what Colbert told me.

Q. Never mind about what Colbert told you; you had no personal knowledge of who made the location, or what it was called after the location had been made?

A. No, sir.

Q. Now go on and state where you saw this notice of which you have spoken?

A. I saw this notice right there at this hole what is called, or what they had called the discovery hole, that

is what it is called, that is all I know, on what is called the Morning Star; and then they put a location notice on there for a relocation and so I went and looked at the name, and it was something like McKinstry or McKinster, something like that; they had a location notice on it.

Q. What was the location notice attached to?

A. I cannot say whether it was on a box or a board.

Q. Did you read it?

A. I did, it was partly covered.

Q. Do you remember anything further than just the location notice? A. I don't.

Q. Can you remember the date of it?

A. It was the first or second of January.

Q. In what year? A. In 1883.

Q. Can you remember the name which was given the claim in that notice, if any name was given?

A. No, sir, I can't.

Q. After that time did you ever see anything else there on that ground which attracted your attention?

A. No, sir.

Q. Did you ever see any posts or other monuments marked as posts of a quartz claim in that locality after that time? A. No, sir.

Q. Now as to the date of that notice which you have described, won't you state once more your best recollection as to the date contained in that notice?

A. I will say the date is, to the best of my recollection, well I will say, I will give it three days more, from the first to the fifth of January, any how, in 1883.

Q. State whether or not you ever saw anybody afterwards making a survey on that ground?

A. I did not.

Q. That is then, all you know about these holes down there in that ground? A. Yes, sir.

Cross-Examination.

By *Mr. McIntire*. Q. You do not pretend to know when these holes were dug down there, or know when the stuff was taken out do you?

A. No, I do not.

Q. You were never there then until 1879?

A. No, sir.

Q. What time of the year in 1879 were you there?

A. I was there in May.

Q. In May, 1879? A. Yes, sir.

Q. How long did you stay there at that time?

A. About two weeks.

Q. Right at that hole you stayed two weeks?

A. No, sir, I was all through the country.

Q. How long did you stay at that hole at any time when you were there?

A. Maybe about ten minutes or less or more.

Q. And you spent two or three weeks prospecting in that valley down there, did you?

A. I spent two or three weeks prospecting all around the whole country.

Q. Got over a good deal of ground in two or three weeks as a prospector, didn't you?

A. I spent some time there and I was satisfied to leave, and went away.

Q. You didn't make any locations there, did you?

A. I did not.

Q. You left there then, and didn't go back there until 1881? A. Yes, sir.

Q. You say that at that time you came back in 1881, and there was another hole on this ground?

A. Yes.

Q. That second hole you saw was to the west of the one you saw in 1879, and that hole was not there in 1879? A. No, sir, I never noticed it, anyway.

Q. You went all over that ground in 1879, did you not? A. Yes, sir.

Q. But you didn't notice it, if it was there, did you?

A. No, sir.

Q. If it had been there you would have noticed it, would you not? A. I don't know.

Q. You say that hole you saw in 1879 was some feet deeper when you came back in 1881—that it was some twelve feet down to the water? A. Yes, sir.

Q. What season of the year was it you were there in 1881? A. In the spring.

Q. When you were there in 1879, that was high water season, wasn't it?

A. Maybe the water didn't come up in 1879.

Q. What time was it that you were there in 1881?

A. In May.

Q. That was in the spring, also? A. Yes.

Q. That is high water season, isn't it?

A. It depends on the kind of year it is.

Q. Who are you working for now?

A. I have been working for the Parrot Company,

John Johnston, after being duly sworn on the part of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. Where do you live Mr. Johnston?

A. I live at 446 East Broadway, now.

Q. In Butte? A. Yes, in Butte.

Q. How long have you lived in Butte?

A. 15 years.

Q. What year was it in which you came to Butte?

A. In 1879.

Q. What is your business?

A. My business is running the fires in mines, and doing firing around the mines.

Q. What was your business in 1879, when you came here? A. To take any job I could get hold of.

Q. Well, what job did you get hold of in 1879 when you came here?

A. I got a job at the Parrot smelter.

Q. Where did you live then?

A. I lived about four hundred yards northwest of the Parrot smelter; when I first came I lived about twenty-five hundred feet from the Parrot smelter, on Arizona street.

Q. In 1879, did you know of a locality called the Parrot gulch? A. I knew the Parrot gulch.

Q. In that year did you ever see in the vicinity of the Parrot gulch any holes or excavations, to which you gave any attention?

A. I saw two holes that I used to go between, I used to go between them night and day.

Q. Was there a road leading through in that neighborhood? A. There was a trail.

Q. Is that the trail which you used to follow in going from your house to the Parrot smelter and back again?

A. Yes, sir.

Q. And you say that trail went between the two holes? A. Yes.

Q. Where were these two holes located with reference to the Parrot gulch that you speak of?

A. One hole was about 130 feet or 150 feet northwest of the Parrot gulch.

Q. And where was the other?

A. The other one was about 130 or 150 feet west.

Q. West of what?

A. West of this one I explained to you just now.

Q. That is west of the first hole you spoke of?

A. Yes, sir.

Q. And you say the trail led between them?

A. Yes.

Q. Describe the first one of these holes as well as you can.

A. Well, at that time in 1879, that one was about 6 or 7 feet wide, and down about 14 or 15 feet deep.

Q. Did you ever notice there at that time anything in the nature of a cut through the ground in that locality?

A. I noticed a cut in which the shaft was, that is all.

Q. Was there anything on the surface of the ground in the vicinity of this first hole?

A. Yes, I saw a good deal of quartz out around there.

Q. Why do you say it was quartz?

A. Well, it looked to me like quartz, and it was, some of it, yellow and brown, and copper-stained.

Q. What is copper stain; what color is that?

A. That is a bluish color—blue and green.

Q. Well, how much of that stuff was there on the surface there?

A. Well, I suppose there must have been probably about eight or nine tons.

Q. Did you look into that hole?

A. I used to look into it once in a while when I came up there, and I thought of it.

Q. Do you remember what you saw at any time when you looked into it?

A. Yes, sir.

Q. Describe what you saw there.

A. I happened to see ore there on the ledge, on the walls, the ledge running east and west.

Q. How wide was this ledge that you speak of?

A. This ledge ran somewhere from about three to four feet wide.

Q. Can you describe its appearance?

A. The ore in it looked kind of green and brown and yellow.

Q. State whether or not you ever looked into the second hole which you have mentioned?

A. I did.

Q. Describe that.

A. Well, that would be about, somewhere about the same, only it was nothing near as deep.

Q. What was its size on the surface?

A. On the surface, six or seven feet wide.

Q. Was there anything on the surface of the ground

near that hole at any time when you looked at it?

A. Yes, I saw quartz on that ground too.

Q. How much?

A. Well, there was about enough around there to level up the soil around there with the top soil.

Q. To make what level with the top soil?

A. The shaft.

Q. What made the shaft level with the top soil?

A. Well, the quartz that came out.

Q. Was this hole on the ravine?

A. Only just on a little dip, south.

Q. What was the appearance of that quartz?

A. I called it, on the surface ground, yellow and brown.

Q. Was it in a pulverized form, fine, or in a coarse form? A. Coarse.

Q. How long during the year 1879 were you employed at the Parrot smelter?

A. I was employed there from the first of 1879 up to 1880, and I never went over the ground then for a year.

Q. For a year after that?

A. Yes, and then I went to work at the Lexington mine, and then I went from there to the Anaconda mine, and I worked at the Anaconda twelve years.

Q. When you were at the Parrot you say you saw these two holes quite frequently, during the time you worked at the Parrot smelter? A. Yes, sir.

Q. Ever recollect of having seen any notice of any kind at either hole?

A. I don't remember of ever seeing a notice on either one of them.

Q. You say that after that you didn't go there, after 1879 you were not on the ground for a number of years?

A. After 1880.

Q. Since then have you ever been on the ground?

A. No, I have been there, but I never took any notice; I never noticed any of the improvements on it; I had enough mining in the Black Hills, I was not interested in mining, myself.

Q. Then since 1880 you have not, as I understand you, been on that ground at all?

A. No, sir.

Cross-Examination.

By *Mr. McIntire.* Q. In your walks between where you lived and the Parrot smelter, did you see any other holes but these two?

A. Oh, I might have seen a couple or three holes lying west of these particular two, but I didn't take any notice of them.

Q. There were other holes around there, were there?

A. Yes, maybe there were, I don't know.

Q. That was on placer ground, wasn't it!

A. Placer ground.

Q. That was being worked then for placer ground, wasn't it?

A. Yes.

Q. You say your house is about 2500 feet east of the Parrot smelter?

A. I think about 2500 feet.

Q. And the trail that you took to go down to the Parrot smelter was right between these two holes which you have described?

A. Yes, sir.

Q. You saw these holes quite frequently, you say?

A. Yes.

Q. You are a pretty good judge of distances, aren't you? A. Yes.

Q. And you say these holes were about 130 feet apart?

A. Somewhere about that—about 125 or 130 feet.

Q. It would not be under 125 feet, would it?

A. I have made a great mistake there; it was somewhere about 75 feet between them, between the two. The west one is about 75 feet from the other one.

Q. Have you been listening to the testimony here for the last two days? A. Yes, sir.

Q. Have you been in this room while we were taking the testimony? A. Yes, sir.

Q. Did anybody tell you, or did you hear any of the witnesses say, that the distance between these two holes was 75 feet? A. No.

Q. That is your own guess, is it, that it is 75 feet?

A. Yes.

Q. Then you want us to understand that they were 75 feet apart, instead of 130 feet?

A. Yes, that is what I am thinking is about right.

Q. You think 130 feet is too far? A. Yes.

Q. When did you first see that hole west of the first one which you have described?

A. I saw them both all the time.

Q. That is they were there all the time you were there? A. Yes, sir.

Q. You just heard Mr. Woolbater testify, didn't you? A. Yes, sir.

Q. Didn't you hear Mr. Woolbater say that he didn't see any second hole there in 1879, that he didn't see it until 1881? A. I did.

Q. But you say you saw it there in 1879?

A. Yes, sir.

Q. You are pretty positive of that too, aren't you?

A. Yes, sir.

Q. What is there that is peculiar about that hole that makes you remember that it was there in 1879?

A. Well, that was my regular landmark, I used to go right between them every day.

Q. Didn't you just now say that there were three holes around there?

A. Didn't I tell you that they were further west, and I didn't pay any attention to them.

Q. You say that you used to look into these two holes whenever you thought of it? A. Yes, sir.

Q. How often did you think to look into these holes — would you say that you looked into them every day?

A. Yes, if I thought of it.

Q. How often did you think of it?

A. Well, I might have looked into them three or four times a week.

Q. What caused you to look into them that often?

A. I don't know, just generally, I suppose them holes down there drew my attention.

Q. Then during this time between 1879 and 1880, you think you looked into these holes from two to three times a week? A. Yes, sir.

Q. You say that when you looked into those holes, you saw a ledge from three to four feet wide?

A. Yes.

Q. And that you also saw a wall? A. Yes.

Q. Did you see both walls of that hole?

A. Yes.

Q. You know what a wall is, do you not? 7

A. Yes, I do.

Q. What is a wall? A. Granite.

Q. And you say you could see both of the walls?

A. Yes, sir.

Q. And that ledge was from three to four feet wide?

A. Yes, sir.

Q. How deep below the surface of the earth was that hole?

A. One of them was somewhere about 14 feet deep.

Q. How deep below the surface of the bedrock?

A. I can't tell, there was water in it.

Q. How do you know it was 14 feet deep if there was water in it? A. I don't know.

Q. You don't know how deep the holes were then, if there was water in them? A. No, sir.

Q. And you don't know how much water there was there? A. No, sir.

Q. Did you find water there in 1879?

A. Yes, sir.

Q. And also in 1880?

A. Yes, sir, in this one of them, in the other there was no water.

Q. Which one was it that you did not find any water in? A. The one farthest to the west.

Q. How deep down was that?

A. Somewhere about 6 or 7 feet.

Q. What year did you say that was in? A. 1879.

Q. Do you remember what month it was in?

A. It was somewhere about December.

Q. How do you remember that is the year so well when you don't remember the month?

A. Well, I remember the years I worked there.

Q. That is how you fix the year, is it?

A. Yes, sir.

Q. You fix it as the year you worked for the smelting company? A. Yes, sir.

Q. You say that you saw green stuff in that first hole you have described? A. Yes, sir.

Q. And brown stuff, also? A. Yes, sir.

Q. And yellow stuff? A. Yes, sir.

Q. Was it all mixed up together?

A. Yes, sir.

Q. Quite a little display of colors, wasn't there down there? A. Yes.

Q. Three colors? A. Yes, sir.

Q. Could you see the same colors in the second hole?

A. Yes.

Q. See the green too? A. Yes.

Q. And the yellow? A. Yes.

Q. And the brown?

A. Yes. I saw brown, this second hole was mostly all brown and yellow, and the second one, the one 75 feet farther to the west of the other one, was brown and yellow.

Q. Didn't you just now say there was green colored ore in there also?

A. Yes; you asked me what the mineral looked like, and I told you that it looked like green, yellow and brown.

Q. Did you apply that answer to the first or the

second hole? A. The first and the second.

Q. And did the second one have all these colors in it too? A. Yes, sir.

Q. Did you tell me a minute ago what you saw the first time you went down to these holes in 1879?

A. I never went down to them.

Q. Well, around these holes?

A. Yes, the first time I came here was on the 9th day of October, 1879, and on the 10th I went around, I was not doing nothing.

Q. Then the 10th day of October, 1879, was the first time you saw these holes? A. Yes, sir.

Q. Were you living down there in the house that you were living in afterwards?

A. I was about 550 feet south of the Butte City Hotel at that time, on Arizona street.

Q. Well, were you living at that time in a different house than the one you were afterwards living in?

A. Yes.

Q. How did you come to go down there on the 10th of October the first time you went down there—you just now stated that you went down there on the 10th of October, 1879? A. I did.

Q. How did you come to go down there?

A. I rented a house there, I remember that well; I came pretty near getting shipwrecked coming in on the stage.

Q. When did you begin work for the Parrot smelter people?

A. Somewhere about September, I think.

Q. This was after you had begun work for the smelting company that you first saw these holes?

A. No, sir, I saw these holes first.

Q. You saw these holes first on the 10th day of October, 1879, you say? A. Yes, sir.

Q. And you began work for the smelting company in September, 1879, you say?

A. Well, you know, it was pretty near Christmas; it was pretty near Christmas when I went to work for the Parrot company.

Q. Well, is September nearer to Christmas than October? A. No, I think not.

Q. You have a good recollection for dates and years, have you not? A. Yes.

Q. Can you tell me, then, which is nearer to Christmas, September or October?

A. I think it must be October.

Q. You think October is nearer to Christmas than September do you; and you say you began work for the smelting company pretty near Christmas?

A. Yes.

Q. You did not go to work there until October, you say?

A. Well, I have no learning, and you probably can get the best of me.

Q. You don't pretend to be able to say when this stuff was taken out of these holes, and when these holes were dug, do you?

A. I saw them holes were there in 1879.

Q. You don't know what was taken out of these holes prior to 1879, do you? A. No, sir.

Q. These holes may have been dug down there a month or two before you saw them, may they not?

A. I never saw anybody digging there.

Q. Then, so far as you know now, the holes were just the same then as they are now?

A. Yes, pretty near, some different.

Redirect Examination.

By *Mr. Clark*. Q. You say that you never noticed any holes down there but these two you have described, in your going back and forth to and from the Parrot smelter?

A. No, I said there were other holes there.

Q. Well, did you not state that this path you used to follow in going to and from the smelter passed right between these two holes you have described?

A. Yes, sir.

Q. Did you ever see any other holes around there?

A. Yes, a little way to the west.

Q. Did you ever see anything on the surface of any of the other holes? A. No, sir.

Q. Now, what month was it, to the best of your recollection, in which you first arrived in Butte?

A. I arrived on the 9th day of October.

Q. In what year? A. 1879.

Q. And when did you go to work for the Parrot smelter? A. I can't answer that question.

Q. Was it that same fall, or the following summer?

A. It was that same fall.

Q. But you can't remember the month, however?

A. No, sir.

(Signed)

JOHN JOHNSTON.

Subscribed and sworn to before me this 16th day of February, A. D. 1895.

[SEAL.]

CHARLES F. ROE,
Notary Public.

N. B. Ringeling, one of the defendants, after being duly sworn, deposes and says:

Direct Examination.

By *Mr. Cole*. Q. You are one of the defendants here in this case, are you not? A. Yes, sir.

Q. What is your business—what are you doing at present?

A. I am mining. I am superintendent of the Hope Mining Company of St. Louis, at Philipsburg, Montana.

Q. What has been your occupation during the last fifteen or twenty years?

A. Well, I have been mining, and I have done surveying.

Q. Been a surveyor?

A. Yes, surveyor and civil and mining engineer.

Q. Did you ever reside in Silver Bow county?

A. Yes, sir.

Q. How long did you reside in this county?

A. I think 'it was in the year 1880 when I came here, and I moved away in 1887 or 1888. I resided here for about six or seven years in Butte, which was then

Deer Lodge county, in 1880. I came here before it was Silver Bow county.

Q. Do you know a mining claim known as the "Childe Harold?" A. Yes, I do.

Q. When did you first know that?

A. I first knew it in 1882.

Q. Who showed it to you?

A. The locator of the claim, Harvey McKinstry.

Q. Mr. McKinstry is dead now, isn't he?

A. Yes, sir.

Q. Were you on the ground with him?

A. Yes, sir.

Q. For what purpose did you go on the ground—for any particular purpose?

A. Yes, Mr. McKinstry—at that time I was in the firm of Kellogg & Ringeling—I was one of the firm, United States deputy surveyors and civil engineers, and Harvey McKinstry applied for an official survey, and I was assisting in that official survey.

Q. Who made the survey?

A. My partner, Mr. Kellogg, made the survey.

Q. Mr. Kellogg is dead, isn't he? A. Yes, sir.

Q. Have you his notes? A. Yes, sir.

Q. Did you see the notice of location when you were on the ground, that you recollect of?

A. Well, I had an impression that I saw it, but I won't swear to the fact; I saw it prior to this survey; I had been on the ground before.

Q. You had been on the ground before that?

A. Yes, that was in 1880 and 1881.

Q. Well, how long before that had you been on the ground? A. I was there in 1880 or 1881.

Q. Was that prior to the date when the Parrot smelter was laid out?

A. The foundations were laid out; I think it was 1880, but I won't swear to that, because it may have been in 1881.

Q. Well, whether it was in 1880 or 1881, was there anyone with you at the time?

A. Yes, I didn't work on the ground there at that time, but I passed it along the trail to the present location of the Parrot smelter, and I saw these shafts, and saw parties working at it at the time.

Q. Do you recollect who these parties were?

A. No, sir, I do not; I have an idea that it was Mr. McKinstry, but I won't say positively.

Q. Well, in either 1880 or 1881, do you recollect of seeing a notice there—give your best recollection.

A. My recollection is that I saw a notice at that time, but I won't say as to whether it was there or not; I can't remember what the notice was; I remember seeing the vein, and the men working at it—on this prospect at that time.

Q. Did you see any ore thrown up on the dump?

A. Yes.

Q. Thrown out of this shaft?

A. Yes, it was a pile of broken ore, small, fine ore on the north side, within ten feet of the shaft; then there was some more coarser rock on the south side, on the dump side of the shaft.

Q. We will come back to the time you were there in 1882; you say you were there with Mr. McKinstry?

A. Yes.

Q. Did he point out the boundaries of the claim to you?

A. Yes, he pointed out the location corners at that time, and I was on the ground several times after that, and when we completed the survey I was on there; it was in March, I should think, and the survey was completed in April.

Q. The same year? A. The same year, in 1882.

Q. Now, at any of the times that you were on the ground, did Mr. McKinstry point out the boundaries or stakes marking the boundaries of the claim?

A. Yes, that is necessary in making a survey for patent; the corners have to be pointed out, and then the survey is fitted in to correspond with the location corners.

Q. Have you the map that was made at that time?

A. I have the office sketch of the map that was filed with the Surveyor-General; this map I hand you is the one.

Q. Who made that map?

A. Mr. Gillie, of the firm of Wilson & Gillie.

Q. What was it made from?

A. It was made from the plat which was filed in the Surveyor-General's office.

Q. And what was that plat made from?

A. That plat was made from the notes which Mr. Kellogg made on March 30th, or between March 30th and April 4th, between these two dates in 1882.

Q. Mr. Kellogg was the United States Deputy Mineral Surveyor? A. Yes, sir.

Q. And these corners were pointed out by Harvey McKinstry, the locator of the claim?

A. Yes, sir, but then, I will state, that these corners did not correspond exactly with the location.

Q. They did not correspond, they were drawn in or extended out? A. They were drawn in mostly.

Q. What was that for?

A. To get a parallelogram, or to fit other surveys, or only to get 1500 by 600 feet.

Q. But at the same time did not Mr. McKinstry point out the original corner stakes, where they were fixed?

A. Yes, that is what he pointed out; he pointed out the original stakes, and then we came in with the surveying, and we put the corners so that we took such ground as we were entitled to take by the survey.

Q. How many corners did Mr. McKinstry point out?

A. Four corners and the discovery shaft.

Q. Well, at the time of this survey, were you at the shaft? A. Yes, sir.

Q. What was the condition of it at that time, what—how far was it down, do you recollect?

A. I think only about ten feet, somewhere along there, but I can't be positive as to the exact depth it was; I have seen it so often and it has changed depths so much.

Q. This other shaft here which has been mentioned, where was that?

A. There was a shaft about one hundred feet, or probably over, from this discovery shaft.

Q. What was the condition of that?

A. That was much larger, if I remember right, at the time it was 8 x 8 x 5 feet deep; I have the notes; I can state exactly what that depth was; it was 8 x 8 x 10 feet deep at that time.

Q. How about the discovery shaft?

A. 5 x 7 x 35 feet.

Q. 36 feet is the depth, isn't it? A. Yes, sir.

Q. That would be the depth from the surface?

A. From the surface; I will state here that these were Mr. Kellogg's notes, but I was with him at the time he took the measurements of it.

Q. He made the notes? A. Yes, sir.

Q. They are in his handwriting, aren't they?

A. Yes, in this case Mr. Gillie made that map; Mr. Gillie was with us on some of these claims here: I took all the field notes and did the platting from them; I have gone over this survey three or four times when the original was made and renewed the corners.

Q. These were the only workings on the "Childe Harold," weren't they? A. Yes, at the time.

Q. Well, did you notice there at that time, or any other previous time in 1880, 1881 or 1882, did you notice what was in this hole, what was in the discovery shaft?

A. In the discovery shaft there was a well defined vein of quartz in place.

Q. About how wide was the vein?

A. The vein is about, I should judge, four feet wide.

Q. Could you see it plainly at that time?

A. Yes, it was not timbered up at that time as it is now.

Q. When was it timbered up?

A. Why, we timbered it up later, I have forgotten the year, but I think it was in 1885 or 1886.

Q. What was in the other shaft that you say was about 75 or 100 feet west of the discovery shaft?

A. There was a vein, the same vein I should judge, the same vein, or in the same direction as the vein points in the original discovery shaft.

Q. When did you become the owner of the "Childe Harold" ?

A. It was in 1885 sometime, I have forgotten the month; I have an abstract here now that will tell.

Q. Do you recollect the time that Harvey McKinstry died?

A. No, I don't remember the year, but it was shortly after we surveyed it, I think it was in 1883, but I am not positive of the date of his death, but his brother came up here and settled up his estate; they had made a filing on that ground at the time he had died.

Q. Did you say that you had seen Harvey McKinstry working on this ground in 1882?

A. Well, I saw Harvey working there at some time, but whether it was in 1882 or 1881, before he had located that, I cannot tell; I saw parties working on that claim at different times, but I cannot remember exactly the year.

Q. Well, when did you take possession of the "Childe Harold," you and your co-owners or co-tenants, Messrs. Tibbey and Migeon?

A. Well, my impression is that we had possession of it before the date of that deed, I think it was.

Q. Well, what is the date of the deed?

A. April 9th, 1885.

Q. Under what survey did you apply for patent?

A. Under the Harvey McKinstry survey.

Q. Which was made when?

A. In 1882, March and April, between March 30th and April 4th. There were several days work done there on the ground.

Q. Well, from the time you took possession—you and your copartners, in April, 1885, the 9th of April—have you done any work of representation?

A. My partners and I have done the work of representing every year—complied with the law—but Mr. Tibbey generally attended to that, and I paid Mr. Tibbey; but one year or two I did the work and he paid me—he and his partner, Mr. Migeon.

Q. Do you recollect what years it was you did the work?

A. In 1886 I did the work—that is the only record I have got; my brother did some work in another year, but Mr. Tibbey may have paid him; I would not be certain as to what year that was.

Q. You are certain you did one hundred dollars' worth of work in 1886, are you?

A. Yes, I have got the affidavit of Mr. Overend that he did the work in 1886, between the first of November and the 31st day of December, 1886.

Q. Who was that done for—you?

A. It was done for me at my request, for myself, Mr.

Migeon and Mr. Tibbey; they were my co-owners; the work consisted of sinking a shaft 4x7x20 feet, according to the contract previously entered into.

Q. What shaft is this?

A. That is the shaft that is west of this one (indicating).

Q. That is the new shaft, isn't it?

A. Yes, the new shaft, west of the two shafts that I mentioned first.

Cross-Examination.

By *Mr. McIntire*. Q. Did you ever see that shaft that you say was dug by Mr. Overend in 1886?

A. Yes, sir.

Q. Did you see it in 1886? A. Yes, sir.

Q. You say that it is west of the two holes or shafts that you first described? A. Yes, sir.

Q. How far west?

A. Well, I should judge 30 feet or so west of the westernmost shaft.

Q. Then, as I understand it, how far would these three shafts be, respectively, distant from one another, beginning at the easternmost one?

A. From the easternmost one to the next shaft, the old shaft that was there when the survey was made, is 124 feet or 120 feet, and the next one would be about 24 feet. I am not positive about that, 24 to 30 feet further west.

Q. That is the one you described as having been dug in 1886? Then the distance of 150 odd feet is the dis-

tance between the easternmost shaft and the westernmost shaft? A. Yes, sir.

Q. Then how far from the eastern end on this "Childe Harold" claim is this easternmost shaft that you have described there? A. 24 feet.

Q. Then we might safely say that 170 odd feet would cover the distance from the eastern end of the "Childe Harold," and would run through the three shafts you have described? A. Yes, sir.

Q. Did you see that shaft that was dug in 1886 by Mr. Overend? A. Yes, sir.

Q. You were there at the time, were you?

A. I was there during the time he did the work.

Q. Do you know of your own knowledge that it was sunk 20 feet deep, of your own knowledge, mind you?

A. I never put a line on it; I saw the shaft there yesterday or the day before, it was about the same.

Q. The shaft is now about the same as it was in 1886, is it? A. Yes.

Q. Is that shaft a timbered shaft?

A. No, sir, it is right on the edge of a cut.

Q. Is it covered over?

A. No, sir, it is open.

Q. Is it a shaft, or what is it?

A. It is a shaft.

Q. Is it a regular shaft? A. Yes.

Q. How far down in this shaft was it before the water was struck?

A. I think we didn't have any water in that shaft.

Q. What time in 1886 was that shaft dug?

A. It was in the winter, November or December.

Q. Is there any water in that shaft now?

A. No, sir, at least I didn't look down into it for water, but as a general thing it has been a dry shaft.

Q. Did you look in the other shafts?

A. In one of them, the discovery shaft.

Q. Is there anything peculiar about the shaft that is nearest east of this one last mentioned, the one that was dug in 1886; can you describe it in any way so that we can go down and see it?

A. I don't understand the question.

Q. Was there anything about this shaft which is nearest to the east of the shaft that was dug in 1886—is there anything peculiar about it which would enable us to identify it from your description?

A. You mean the one that I said was about 25 feet east from the Overend shaft?

Q. We will call the shaft dug in 1886 the Overend shaft.

A. Yes, sir.

Q. Now the nearest shaft east of that, is there any distinguishing characteristics or peculiarities about it which will enable us to identify it?

A. Now since you mention the shafts, there is one of the shafts there timbered. I cannot recollect whether this is the nearest to the Overend shaft, or whether it is the original shaft Number Two.

Q. Then we have another shaft enrolled?

A. Yes.

Q. So that instead of three, there are four?

A. Yes, there are four, but that is covered over and I have not seen in it.

Q. Next to the Overend shaft, on the east, there is a covered-over shaft?

A. That is what I say; I don't know whether it is covered over or whether it is the number two shaft. I think there is the number two shaft, and then this timbered shaft, and then the discovery shaft: I think that is the order.

Q. What do you call the number two shaft?

A. I call the number two shaft—when making surveys for patents we number the improvements, and shaft number one is discovery shaft, and then the next shaft would be shaft number two, and so on.

Q. But there are only two shafts mentioned in the original survey of the "Childe Harold"?

A. That is all the shafts there were there at the time—yes, that is all the shafts; when application was made there were more, but I don't know whether we put them in or not.

Q. At the time application was made there were only two shafts? A. Yes.

Q. That is the discovery shaft which you designated as number one, and another shaft which you designate as number two?

A. We didn't designate as number one; we always call the discovery shaft discovery shaft, and number two.

Q. How far from the discovery shaft was number two, and in what direction?

A. If I remember correctly, it was just 124 feet westerly.

Q. The discovery shaft and number two were the only

two shafts that were there when the survey was made?

A. Yes.

Q. In making that survey as Deputy Mineral Surveyor, just tell us whether Mr. Kellogg made a note of the improvements on the claim.

A. Yes, sir.

Q. Coming down again to this Overend shaft, how far from that shaft which you designate, how far is it from that shaft which you designate as number two, and in what direction is it?

A. I think it is, as I have stated, 24 to 30 feet, maybe 40 feet.

Q. Is shaft number two a timbered shaft?

A. No, sir, it is an old shaft, and it has been caved on the sides so that it is now on the edge pretty near ten feet square on the top or surface, and then it narrows down to about 4 feet or 5 feet or 6 or 7 feet on the bottom.

Q. There are no timbers around it at all?

A. No, sir.

Q. How deep was that shaft at the time you made the survey?

A. It was about five feet deep, 8 x 8 x 5 feet deep.

Q. Do you know how deep it is now?

A. It is about 10 or 12 feet, I should say.

Q. Now, then, as to the discovery shaft; was there any peculiar mark about it that we can identify?

A. It is timbered up about five feet above the bedrock, and has a windlass frame on it, if I remember rightly, a standard; the bedrock had been washed out for say twenty feet in width, and the discovery was right in this place where the surface had been washed off.

Q. This windlass, standard or frame, which you speak about, how far above the timber is that at present?

A. It is about the usual height, say three feet, or three feet and a half, something like that.

Q. Is there any shaft there in a line with the shaft you have mentioned with this windlass frame over it?

A. Yes, sir.

Q. That is not on the "Childe Harold" ground at all, is it? A. No, sir.

Q. That is to the east of the "Childe Harold" isn't it?

A. To the east about 30 or 40 feet, I should judge.

Q. Do you know, of your own knowledge, that that claim has been represented every year since 1886, not what has been told you?

A. I know of my own knowledge with the exception perhaps of one or two years, because I was there during the time the representation work was going on.

Q. What years were you there during the representation work?

A. Well, I was there every year about—I couldn't positively say as to that now, but I remember of seeing men there at work who Mr. Tibbey had put there for two or three years; I remember of seeing a Mr. Overend in 1886, and I remember of seeing my brother there one year.

Q. What year do you remember of seeing your brother there?

A. Well, sir, I cannot say what year it was.

Q. Can't remember the year, can you?

A. No, sir.

Q. But you can locate the year 1886 pretty definitely, can you not?

A. Yes, I have the sworn statement of Mr. Overend, and I saw him on the ground.

Q. When you made this survey in 1882, did I understand you to say that it was in the spring, in March and April?

A. Yes, sir.

Q. Was there any water in these holes, either of them that you have mentioned, at that time?

A. That I cannot say; I will state here that that shaft has been filled up, that is I think, with tailings.

Q. I am referring now to the 1882 survey?

A. Yes, sir.

Q. Was there any water in either of these holes in 1882?

A. In number two there was no water, the discovery may have had some water, but I don't remember now.

Q. You say the discovery was 35 feet deep there in 1882?

A. It must have been at the time.

Q. Do you know from your own knowledge, that it was 35 feet deep at that time in 1882, regardless of any other source of knowledge?

A. No, I won't state that, because that shaft, as I said before, had been filled up partially with sand and sometimes it had water in it, but I cannot state whether there was any water in it in 1882 or not.

Q. I believe I asked you whether you knew of your own knowledge that that shaft was 35 feet deep in 1882, at the time you made the survey?

A. I should state it was that deep at that time.

Q. Do you know of your own knowledge that it was that deep at that time?

A. It might have been; there was water in it, and I took Harvey's word for it, as we deputies have to take the word of the owners; so I won't swear that it was that deep at the time, I just measured it to the water.

Q. Did you measure it yourself?

A. I must have measured it because I was one of the chain-men, or the rod-man at the time.

Q. Was the shaft, the discovery shaft, timbered in 1882? A. It was not timbered as it is now.

Q. Was it timbered at all?

A. It must have been or else it would not have stood.

Q. Do you remember whether it was timbered or not?

A. My impression is that it was partially timbered, that is all.

Q. Do you remember the number of sets there were in that hole in 1882? A. No, sir.

Q. Was it lagged in any way?

A. My impression is that it was partially lagged; but I will state here that I do not think that any of the timber that is in there now was in there then.

Q. Your impression is that in 1882 it was entirely timbered and lagged?

A. My impression is that it was timbered partially and lagged some; I remember the vein on either side the first time I saw the shaft, so it couldn't have been lagged very close; it may have been lagged on the hanging wall.

Q. When was the Parrot smelter laid out?

A. 1880 or 1881.

Q. Can you fix the year any closer than that?

A. No, sir, I can not.

Q. Do you remember what part of the year that was, whether it was the early part or the latter part?

A. I would say that we went down there in May; I would not say it was started then; I will say that the preliminary survey was made for the elevations.

Redirect Examination.

By *Mr. Cole.* Q. Do you recollect the year that this suit was commenced? A. Which?

Q. This "Childe Harold" suit, the suit we are engaged in trying now—what year was that?

A. I think it was—we advertised or posted notice in 1887.

Q. So this work done in 1886 was when you resumed work on this lode? A. Yes, sir.

Q. By the man that is mentioned in that affidavit?

A. Yes, sir.

N. B. RINGELING.

Subscribed and sworn to before me, this 26 day of February, A. D. 1895.

[SEAL]

CHARLES F. ROE,

Notary Public.

John Gillie, after being duly sworn on behalf of the defendants, deposes and says.

Direct Examination.

By *Mr. Clark.* Q. You are a mining engineer and surveyor? A. Yes, sir.

Q. And you live in Butte, here? A. Yes, sir.

Q. How long have you lived here and been engaged in that business? A. Since the summer of 1881.

Q. Were you, at any time since you have been engaged in that business, ever associated with the firm of Kellogg & Ringeling as assistant to them?

A. Yes, in the summer of 1881, and until the early summer of 1884.

Q. Have you ever seen that book before—this book here? (Handing witness a book.) A. Yes.

Q. What is that book?

A. It is the note book used by Mr. Kellogg of the firm of Ringeling & Kellogg in keeping his notes of official surveys.

Q. State, please, whether or not there are any other entries in that book in your handwriting which may be in reference to the "Childe Harold" quartz lode location?

A. No, sir, not in the note book. I would explain this note book; I was assistant in their office in the working up of these official surveys, and among other things Mr. Kellogg would make a survey in the field and he would turn this note book over for the purpose of working up the notes for the survey, that is, making a plat, the United States computation of areas, and then make copies of that plat for office record. This small sketch Mr. Ringeling referred to, I think, is the office record of the official survey as turned into the Surveyor-General's Office.

Q. Was that sketch or plat which you have just described made by you? A. Yes.

Q. The notes around it are in your handwriting, are they? A. Yes, sir.

Q. And that, you say, is a copy of the plat made from the official survey made by Mr. Kellogg and Ringeling of the "Childe Harold" lode claim?

A. It is a partial copy of the official plat, I said official plat, having been made from this notebook of Mr. Kellogg.

Q. Could you, by reference to the plat, or from your recollection, tell about the year in which you made that plat?

A. Yes, in 1882.

Q. Mr. Gillie, have you been upon the "Childe Harold" claim recently for any purpose?

A. Oh, I might have crossed it going to or from the depots, but not for any purpose.

Q. I mean quite recently, have you been down there to look at these corners—something of that kind?

A. No, sir, not myself; my partner was down there recently.

Q. And from his notes have you made a sketch of the points around the claim which he looked at?

A. I have made a sketch from notes of surveys that I have made at different times myself in connection with the notes of the official survey as approved.

Q. I understand that you made that tracing yourself, Mr. Gillie?

A. It was made under my direction.

Q. From Mr. Wilson's notes?

A. From the notes that he made down there recently.

Q. I understood that it was you that went down to the ground the other day and located the corners of the "Childe Harold" claim?

A. No, sir, I want to explain that this map was

made from the notes of surveys that I had made myself at different times, in connection with the official notes of the survey as approved—the official survey of the “Childe Harold” claim as approved. This survey that was made recently, to which you refer, was merely for the purpose of marking on the ground the directions of the lines, at your request.

Q. And that was done by your partner, Mr. Wilson?

A. Yes, sir.

Q. Now, won't you indicate by marking upon this plat, which you have made from your previous surveys of the “Childe Harold” claim, about where the shafts are, or the discovery holes are located on the claim?

A. The only shaft of which I have knowledge is the discovery shaft located near the easterly boundary, about midway, within about 24 feet of the easterly boundary.

Q. This plat is drawn in accordance with the official survey originally made of the “Childe Harold” lode claim, isn't it? A. Yes, sir.

Q. State whether you know a locality called the Parrot gulch in that neighborhood? A. About.

Q. Where is the shaft which is indicated on this plat situated on the ground there with reference to this Parrot gulch?

A. Well, this Parrot gulch lies northerly and southerly in the neighborhood of this discovery shaft.

Q. Now, is this the discovery shaft which is indicated on this plat, and as the shaft west of the eastern boundary line of the “Childe Harold” claim?

A. Yes.

Q. Is it the first shaft?

A. Yes, west of the Parrot gulch. It is about the Parrot gulch, as I know it is to a great extent, and has been ever since I have been acquainted with it, used as a tailing race, and it has been filled up down in there, and the exact position of the gulch cannot be run since 1882.

Q. You have been, of course, on the ground at various times for the purpose of making these surveys of which you spoke, have you not? A. Yes, sir.

Q. In this discovery shaft that you mention, and which you have located on this plat, the first shaft to the east, or the second, or is it the farthest shaft towards the east on this ground?

A. As far as I have any knowledge, it is the first shaft west of the east end line.

Q. State whether or not you can state positively from these surveys which you have made of the "Childe Harold" claim that this discovery shaft is inside of each end line of the "Childe Harold" lode claim?

A. Yes, sir.

Q. Now referring just for a moment to this first plat, which, as I understand it, is the one you made at the time you were in Kellogg & Ringeling's office, from the official survey of the "Childe Harold" claim, that you made entirely yourself, did you not?

A. Yes, I did.

Q. And from the notes of the official survey of the claim?

A. Yes, sir, made from the official plat that was made from the notes of the official survey.

Q. What does that line (indicating) represent?

A. That line represents one of the boundaries of the right-of-way ground of the Montana Central Railway.

Q. Does that line represent any other line?

A. It is a legal subdivision line, being the easterly boundary.—

By *Mr. Cole*. Q. It don't represent the eastern subdivision line on there does it, on the map?

A. That is what it is intended to represent.

Q. The eastern boundary line of lot what?

A. Of Lot Number Four, being the southwest quarter of the southwest quarter of Section 18, Township 3 north, Range 7 west.

By *Mr. Clark*. Q. You are acquainted with the exterior boundaries of mineral application Number 511, commonly called the Noyes & Upton placer mineral entry, are you not? A. Yes, sir.

Q. That line is also the eastern boundary line of the application, isn't it? A. Yes, sir.

Q. Then the discovery shaft, the discovery hole, of the "Childe Harold" is to the east of the east line of mineral entry Number 511, isn't it?

A. I have never positively run the line on the ground, with reference to the shaft, but I can state of my own knowledge that these lines and bounds are accurately designated on that plat I have, except the notes of the official survey in a number of instances, and the stake of the "Childe Harold" exterior showing that connection line as official, together with which would so place the line with reference to the shaft.

Q. It is a fair assumption to say that that plat is correct, isn't it?

A. I believe it to be correct, yes.

Q. Do you know how far, or could you tell how far from the eastern line of mineral entry Number 511 that hole marked "D" is located?

A. No, sir, I could not tell you exactly how far; some small distance.

Q. That hole which we have designated on the plat as "D" is how deep, do you know?

A. No, sir, I do not.

Q. Do you know how large a hole it is?

A. No, sir.

Q. Do you know any distinguishing features about it by which it could be recognized or identified?

A. No, sir, I do not.

Q. Is it a timbered shaft within your knowledge?

A. Not to my knowledge.

(Signed)

JOHN GILLIE.

Subscribed and sworn to before me this 16th day of February, A. D. 1895.

[SEAL.]

CHARLES F. ROE,

Notary Public.

M. E. Mayer, after being duly sworn on behalf of the defendants, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. Where do you live Mr. Mayer?

A. I live in Butte.

Q. How long have you lived in Butte?

A. Since 1877.

Q. What has been your business, Mr. Mayer?

A. On West Park street.

Q. Well, what is the nature of your business?

A. Assaying.

Q. You are an assayer? A. Yes, sir.

Q. Have you been engaged in that business ever since you came to Butte in 1877? A. Yes, sir.

Q. State whether or not you knew a man, or in 1877 or 1888, you knew a man by the name of John Bridenbutcher? A. I did.

Q. Do you remember what his business was at that time? A. Yes, sir.

Q. What was it? A. A shoemaker.

Q. State whether or not you remember of this man John Bridenbutcher having brought you about this time, in 1877 or 1878, a sample or samples of quartz?

A. He did.

Q. Did you make an assay of it? A. I did.

Q. Have you any record of that assay?

A. I have.

Q. Have you it with you?

A. I have got a copy of it.

Q. Where is the original record which you made?

A. I have got that in the books; I can produce the books as easy as you can produce any of these books there.

Q. Have you recently referred to the original book in which you made the record of that assay—have you looked at it lately?

A. I looked at it here about a week ago.

Q. You read it over at that time, did you?

A. I read it over because the parties wanted me to hunt up that assay.

Q. Now, can you give, substantially, from your memory what is contained in that record, in that book, you can refer to that copy you have there?

A. Yes, sir.

Q. You can tell now what the result of that assay was?

A. The result of that assay was: This assay was made December 20th, 1878, sample brought by John Bridenbutcher; it contained 14.1 per cent copper, 2.43 ounces in silver, and also 0.20 ounces in gold; the gold is worth \$4.13.

Q. How long after these samples were brought to you did you make that assay?

A. The very next day.

Q. Did you give the result of that assay to anyone after you had made it?

A. I gave it to Bridenbutcher.

Q. Do you know, of your own personal knowledge, where Mr. Bridenbutcher obtained these samples which he brought you for assay?

A. That I don't know.

Q. Do you know who paid you for it, if anybody?

A. Mr. Bridenbutcher paid me for it.

Q. Do you know where Bridenbutcher is now?

A. Well, he is dead, I know that.

Q. And that is all the memorandum you made at the time regarding that assay?

A. That is all of that assay.

Q. Well, did you make any assay for this man Bridenbutcher at any other time that you can recollect?

A. That I don't know; this assay I made, sure; I am positive of it because the parties gave it to me the year I made it, and when they came to me the other day I hunted it up, hunted up the record and I found it in my records.

Cross-Examination.

By *Mr. McIntire.* Q. Mr. Mayer, Mr. Bridenbutcher may have brought you other samples for assay, might he not? A. I think he did, I think I made him two or three assays.

Q. Now Mr. Mayer, I notice that you have given a date there, December 20, 1878; Bridenbutcher brought you the sample of December the 19th, 1878; if he brought them in the evening say, for instance, on the 19th, they would be made on the 20th?

A. Yes, sir.

Q. Well, could you tell us from that about the time when he brought you these samples?

A. I couldn't tell just the assay that was brought in; it was made December 20th. If a man brings me an assay, for instance, in the evening, I take that man's name down, and the very next day I make that assay and date it on that day.

Q. And that is what you did in this instance?

A. Yes.

Subscribed to and sworn before me this — day of
 ——— A. D. 1895.

William Burton, being duly sworn on the part of the defendants, deposes and says.

Direct Examination.

By *Mr. Clark*. Q. How long have you lived in Butte, Mr. Burton?

A. Ever since I came here.

Q. Well, when did you come here?

A. In 1878.

Q. Have you lived here ever since?

A. Yes, that is what I say.

Q. Well, what has been your business?

A. Mining and smelting.

Q. Where were you mining in 1878, when you first came here? A. I was not mining then.

Q. Where did you do your first mining after you came here, and in what year? A. In 1879.

Q. And where did you do your mining in 1879, in what part of the town?

A. Down here near the Colorado smelter.

Q. Did you know at that time of a location or locality called the Parrot gulch?

A. Yes, I know the Parrot gulch.

Q. Where was that?

A. Way down here near the Parrot smelter.

Q. Do you know anything in regard to any quartz location which was ever made in the immediate vicinity of the Parrot gulch? A. No, not in that year.

Q. Did you ever hear of a quartz location called the "Childe Harold"? A. I seen that.

Q. When did you first see it, and where?

A. Well, about '82 I think.

Q. Just state what you saw there?

A. I see a notice up there that is all.

Q. Where did you see that notice?

A. Why, when I used to pass by there going to work, all the time.

Q. Where were you working in 1882?

A. In the Parrot smelter.

Q. Where were you living?

A. Oh, just about six hundred yards of the Parrot smelter.

Q. In which direction from it?

A. Northwest.

Q. Well, now describe, as near as you can remember, where you saw this "Childe Harold" notice?

A. Well, I have seen a hole there all the time ever since.

Q. Well, where is the hole?

A. About 1000 feet south and a little east from Charley Colbert's cabin.

Q. When did you first see that hole you have just described? A. I am positive I saw it in 1879.

Q. Describe it as it appeared when you first saw it!

A. I wanted to jump it.

Q. Well, describe it?

A. There was a lot of rock on top, and a well-defined lead, and there was a lot of ground thrown out on top, too, and there was another hole behind that.

Q. Now, where was the first hole with reference to the Parrot gulch?

A. The Parrot gulch used to run away down to that. You know where the Parrot gulch used to run.

Q. Where was this hole with reference to the Parrot gulch?

A. About 100 or 150 feet west of the Parrot gulch.

Q. How deep was the hole when you first saw it?

A. In 1879; oh, about 14 feet.

Q. How far from the first hole was the second hole that you say you saw there?

A. About 75 or 100 feet.

Q. In which direction?

A. West, and there was another pile of ore there?

Q. How deep was the second hole the first time you saw it? A. Oh, about 8 or 10 feet.

Q. How much ore was there in the first hole when you saw it first?

A. Well, I didn't measure it, I didn't take particular notice of that, but there was ore way back in the cut.

Q. Do you know a mineral vein when you see it, a quartz vein? A. Well, I ought to.

Q. State whether or not you saw any evidences of a quartz vein in this first hole the first time you saw it.

A. Well, I would have jumped it.

Q. Well, I asked you if you saw any evidences of a quartz vein the first time you saw it?

A. You bet your life I seen it.

Q. How wide was it?

A. Now, I'll tell you; when I first see it, from the foot wall there was ore that I would not care for at all, then a quite a strip of copper, then something else, then copper again.

Q. How do you know it is copper—could you tell by its appearance? A. Why, certainly.

Q. What is its appearance? A. Copper.

Q. What color was it? A. Green as grass.

Q. What did you see in the second hole?

A. The same.

Q. Did you see any vein there? A. Yes, sir.

Q. How wide was it?

A. Well, when I saw the second hole it was caved in, and I couldn't see the vein plain enough all through.

Q. What was the color of the vein? A. Green.

Q. In that second hole was it green?

A. Yes, sir.

Q. How much ore was there, if any, on the surface around it?

A. Well, I couldn't tell how much ore there was.

Q. Was there any? A. Yes, sir.

Q. Where was that notice on the "Childe Harold" claim which you say you saw in 1882?

A. That was on the east hole—on the hole farthest east.

Q. What was it attached to? A. A box.

Q. Did you read it?

A. No, I didn't read it over, probably, but I saw I was in the soup; I wanted to get there, and I got fooled in that business.

Q. State whether or not you remember what name was signed to it, if any was signed to it.

A. I don't know; I saw the "Childe Harold," and I says to myself, this is a Scotchman sure.

Q. Well, you saw the words "Childe Harold"?

A. Yes, I seen that all right, and I didn't look for the rest.

Cross-Examination.

By *Mr. McIntire*. Q. This vein you saw down there was in 1879, wasn't it—or what year was it you saw these things? A. I am positive it was in 1879.

Q. Not before 1879, was it?

A. Well, I can't say. I know I seen that in 1879.

Q. You say you were working at the Parrot smelter then?

A. No, there was no Parrot smelter there then.

Q. Didn't you just say that you were working for the Parrot smelter? A. 1881 and 1882.

Q. Were you working at the Parrot smelter when you saw these holes? A. No, sir.

Q. What time in 1878 did you come to Butte?

A. The 14th day of December, 1878.

Q. What part of Butte did you live in then?

A. Well, I lived here first, and then I moved over there to Washington street.

Q. Did you live up in the central part of town?

A. No, I lived in Mercury street when I first came here, then I moved over to the foot of Idaho street.

Q. How far is Mercury street from this place down there in the valley? A. About 1,600 feet.

Q. How far from the flat was it that you lived in 1878? A. About 1,600 feet.

Q. When did you begin mining in this country?

A. I commenced as soon as I came here.

Q. Do you mean that you commenced in 1878?

A. No.

Q. You began mining in 1879, didn't you?

A. Well, pretty near; I made a location in 1879.

Q. Where was your location?

A. I have got it yet.

Q. Where is it? A. The "Lilly."

Q. How far is the "Lilly" from the flat?

A. It is about two miles.

Q. You say you lived near the Colorado smelter; when did you live down there?

A. I lived on the road to the Colorado smelter when I lived at the foot of Washington street. I live back of the Moulton mine.

(Signed) WILLIAM BURTON.

Subscribed and sworn to before me this 16th day of February, A. D. 1895.

CHARLES F. ROE,
Notary Public.

B. E. Tibbey, one of the defendants, sworn in his own behalf, deposes and says:

Direct Examination.

By *Mr. Clark*. Q. You live here in Butte, do you not? A. Yes, sir.

Q. How long have you lived here?

A. Since 1877.

Q. And you are a mining man, are you not?

A. Yes, sir.

Q. You are with the Parrot company?

A. Yes, sir.

Q. Do you know a quartz claim, *Mr. Tibbey*, called

the "Childe Harold"? A. Yes, I am interested in it.

Q. Who owns the "Childe Harold" claim, do you know?

A. Myself, Mr. Ringeling and E. F. Migeon, of Torrington, Connecticut.

Q. How long have you owned it? A. Since 1885.

Q. Where did you get it then; did you locate it, or get it by purchase?

A. From somebody else; Mr. Ringeling, I believe, done all the business, and I took an interest in it with him.

Q. Who did you get your interest from?

A. We all put in together, and Mr. Ringeling did our business for us.

Q. Who did you buy it from? A. Mr. McKinstry.

Q. Do you remember his full name, what McKinstry it was?

A. No, I don't remember his full name; we got it from McKinstry or his brother.

Q. Who was his brother?

A. I don't know; I have never seen him.

Q. Do I understand you were buying it personally?

A. From the estate, through the trustee for the estate; Mr. McKinstry's brother was there.

Q. Whose estate was it?

A. I don't remember his name.

Q. Do you remember whether or not you took a deed of it from him?

A. Yes, but Mr. Ringeling done all the business that was done in it.

Q. Well, state what work, if any, you have done on

the "Childe Harold" claim since 1885, when Mr. Ringeling, as you say, purchased it for you three?

A. We represented it each year afterwards; there was one year, in 1886, that Mr. Ringeling represented it while I was east, or while I was some place, I think I was east, and Mr. Evans represented it last year, because I was at the World's Fair at that time; every year besides these two I have always been there when the representing was done.

Q. You say "representing"; you mean by that, "representation work," do you not? A. Yes, sir.

Q. How much work has been done there each year?

A. One hundred dollars and over; there has always been a little over a hundred dollars.

Q. What was the character of that work?

A. What work I done there was on the discovery shaft; there was a set of timbers, practically two sets of timbers in it, round timbers, and there was sand that had run into the shaft, and we retimbered the shaft the first year and cleaned it out and retimbered it; we always figured in our timber, the labor we done in our representing; we had to dress down the shaft to make it square in some places—had to crop off a little.

Q. Do you remember the first year you done any work there, whether the shaft upon which you done the work was timbered or not?

A. I timbered it the first year.

Q. Do you remember how big the shaft was that year?

A. We didn't go quite to the bottom of it that year in putting in the timber, the amount of one hundred

dollars was not enough to do that, but we took some of the old timber out that was there; the water and dirt was running down in the shaft, and we took the sand out straight down to the bottom and timbered it up to make a solid foundation for our shaft timbers.

Q. You cannot give us any idea about how deep you went down with the timbering the first year?

A. The first year we went down and cleaned out to the bottom.

Q. Can you give us any idea as to the depth of the shaft as it was when you saw it that first year?

A. Well, probably, there was sand in the bottom of it that first year which had run in from the surface, and the shaft was about ten feet, I should judge.

Q. This shaft of which you are speaking now, was which one?

A. The discovery shaft.

Q. With reference to the Parrot gulch, you know where the Parrot gulch is, don't you?

A. Yes, sir, I know it all right, from the corners of that other claim here (indicating) about twenty feet or probably a little more from the east end line of the "Childe Harold" claim.

Q. Who, if anyone, ever gave you any information as to where the lines of the "Childe Harold" claim were?

A. Mr. Ringeling took me down there and showed me these corners at the time.

Q. Which corners?

A. The northeast and the southeast corners, also the northwest and the southwest corners.

Q. He showed you all four corners?

A. Yes, sir.

Q. Do you remember whether there were any mounds there at that time to mark the corners?

A. Yes, sir, there were rocks, proper mounds, or monuments.

Q. Then this shaft was the first shaft east of the line indicated by these rocks in the corners, as he showed them to you at that time?

A. Yes, sir.

Q. Well, now state what the character of that work has been which you have performed since that first year?

A. We timbered the shaft down, and we just sunk it, probably about five feet: the water is pretty heavy there, the water is too much for a bucket—without pumps.

Q. At the time you first went down there, were there any shafts in addition to this one you have just been describing?

A. There is another one near the discovery shaft there, probably one hundred feet or more west of that point.

Q. West of that first one?

A. Yes, sir.

Q. Do you remember, in addition to these two, whether there were any other holes there when you first went on the ground?

A. I don't remember that there were.

Q. State whether or not the representation work you say you have done each year since, was done wholly on this first shaft, or was part of it done upon the other shaft?

A. We done representation work upon the first shaft and also we sunk a shaft in between these two shafts,

probably it is 25 or 30 feet east of the second one; we sunk that down to the water and timbered it.

Q. Well, has any of this representation work which you have done since 1886 been done otherwise than by work done upon these two shafts?

A. Yes, Mr. Ringeling done the work. I went east that year. He done it still west of that by sinking another hole or shaft, but that was not timbered or anything.

Q. Now, in the year 1893, state what you did, if anything, to represent the "Childe Harold" claim?

A. We represented it that year; I think Mr. Evans represented for me while I was east.

Q. Who is Mr. Evans?

A. He is the foreman of the Moscow mine.

Q. Is he in your employ?

A. Yes, but he has taken an affidavit to it, and that is recorded in the records.

Q. Did you pay Mr. Evans for doing that work in 1893?

A. I paid the men when I got back; I gave Mr. Evans \$103.00, I think.

Q. Did you represent it in any other way than by giving or having Mr. Evans do this work?

A. No, sir, only what Mr. Evans himself did.

Q. Do you remember whether you filed in the year 1893 any affidavit in lieu of representation work?

A. Mr. Evans did; I told him to go down to the attorney and get it fixed up, and take the affidavit there.

Q. And you don't know anything about that personally?

A. No, sir, it is on record.

Q. In the year 1894, what did you do to represent the claim, if anything?

A. We done our representing there; there was no time but what we done our representing work.

Q. Do you remember whether or not you filed a notice in lieu of representation work in the year 1894?

A. Yes; I did not do that myself; I say we done representation work in 1894—we didn't need to represent it in 1894.

Q. That is, you filed a notice in lieu of representing it?

A. Yes, we didn't do any work on it, come to think of it.

Q. In addition to the representation work which you say you did on these two shafts, or digging these two holes, state whether or not you ever ran any cuts, or ran any channels of the claim?

A. Yes, we dug and run a drift and sunk a shaft east about twenty feet and drove a little crosscut, and we ran cuts through it at different times—ran a drift into the end of the bank, cut in under the wash while following the vein.

Q. Are these cuts you speak of there now?

A. You can't just see each one of them, they are filled up with sand which has washed in.

Q. Have you been down there—on the ground there lately?

A. Yes, I was down there to-day.

Q. And you have been down, have you, recently?

A. Yes, sir.

Q. At the present time, can you state about the depth of the shaft farthest towards the east?

A. It is between 30 and 35 feet, maybe a little more. I can't say positively as to a foot or two.

Q. Can you tell us about how deep the second shaft is, the one nearest towards the west, at the present time?

A. That is timbered up—do you mean the discovery shaft?

Q. Well, you said there was a discovery shaft, and then another one farther west?

A. No, the one that is timbered is east of the discovery shaft a little, 25 or 30 feet, or such a matter.

Q. With reference to that one that is east of the discovery shaft, tell us how deep that is?

A. About 20 feet deep.

Cross-Examination.

By *Mr. McIntire*. Q. Where is the discovery shaft on the "Childe Harold"?

A. The discovery shaft is on the east end of the "Childe Harold."

Q. How far from the east end line?

A. About 20 or 25 feet or such a matter, I cannot say exactly.

Q. How far from that is the next hole, and in what direction?

A. Do you mean to the other discovery—to this shaft which you have mentioned before?

Q. Let us get at it in this way: The first hole you call the discovery hole of the "Childe Harold"—is it timbered in any way?

A. No, it is not.

Q. That is not timbered, is it—it is an open hole?

A. Yes, sir.

Q. Without any timbering upon it?

A. Without any timbering upon it.

Q. Where is the next hole with reference to that on the "Childe Harold" ground?

A. It might be 25 or 30 feet east of that.

Q. On the "Childe Harold" ground?

A. Yes, sir.

Q. Well, didn't you just now say that the discovery on the "Childe Harold" is 24 or 25 feet west of the east-end line of the "Childe Harold"?

A. I meant the second hole; you asked me about the second hole; when I was asked about the first hole or shaft, I said it was about 24 or 25 feet from the east end line.

Q. Where is the next hole with reference to this hole?

A. The next discovery shaft is about one hundred feet—probably a little more.

Q. In what direction?

A. West from this discovery shaft.

Q. Is this hole covered up in any way—the second discovery? A. No.

Q. It is not timbered? A. No.

Q. The first one is not timbered, is it?

A. Yes, the first one is timbered.

Q. The hole, then, next to the east end line of the "Childe Harold" is timbered, is it? A. Yes, sir.

Q. That is what you call the discovery of the "Childe Harold"? A. Yes, sir.

Q. But the next one west of that is not timbered?

A. No, sir.

Q. Now, how deep is that first hole?

A. It is about between 30 and 35 feet.

Q. And the second hole is how deep?

A. I should judge somewhere about 10 or 12 feet.

Q. Are there any other holes on that ground except these two?

A. There is another little shaft just east of it about 25 or 30 feet or such a matter.

Q. East of what?

A. East of the second discovery.

Q. Don't you mean west? A. No, I don't.

Q. Now, we will say there is the discovery there (indicating)—is the second discovery hole you have mentioned: then there (indicating) is another over east, you see now, isn't that west?

A. Yes, but it is between these two.

Q. Well, the third shaft would be east of the west shaft?

A. The first discovery is on the east end of the ground, and the other discovery is about one hundred feet west of that, and this shaft which I have mentioned is a little east of that second discovery.

Q. Is this third hole you have mentioned timbered?

A. Yes, it is timbered.

Q. Are there any other holes on this ground?

A. There is another shaft that was sunk there by Mr. Ringeling; I never was down in that, and I don't know how it is.

Q. How deep is that third hole, the one that is 25 feet east of the second discovery?

A. That is down about 20 feet; that is timbered.

Q. How large are these respective holes?

A. The discovery is 4x6, and the other one, the second discovery, is the same size; these are the two holes that are timbered.

Q. You first became acquainted with that ground in 1885, didn't you?

A. Yes, that is, I passed over it a great many times before.

Q. You passed over it, but your own knowledge of the ground dates from 1885, doesn't it?

A. Yes, sir.

Q. How many holes were there there in 1885?

A. These two.

Q. The two discoveries? A. Yes, sir.

Q. The one near the east end line, and the other one which was timbered? A. Yes, sir.

Q. How deep were these holes in 1885?

A. The discovery shaft was—there was a good deal of sand in it at that time, and I took and cleaned it out the first year and timbered it; I put in four sets of timbers, dressed it down, put in four sets of timber and took the sand out.

Q. How deep did you leave it when you got through with it in 1885? A. Twenty feet timbered.

Q. And it is about fifteen feet deeper now than it was in 1885? A. Yes, sir.

Q. Now that second discovery, how deep was that in 1885?

A. I never cleaned that out until this year.

Q. Now you have left it about 12 feet deep?

A. Yes, I just cleaned the loose dirt out, that leaves it about 12 feet deep, somewhere about that.

Q. That goes down to the original soil, does it?

A. No, that goes down to the solid ground.

Q. In 1886, where was the work done there—that was done by Mr. Ringelng? A. Yes, sir.

Q. And that was done in the farthest hole west?

A. Yes, sir.

Q. That was done entirely in 1886? A. Yes.

Q. That hole dug there in 1886 by Mr. Ringeling, is now not timbered? A. Yes.

Q. In 1887, where was any work done on that ground?

A. Well, I can't say exactly as to which year we done it; but we done work upon one of the cuts, drifted in the end and ran into the bank.

Q. You say you ran a drift there; where was that drift?

A. We ran a little drift on the vein in the gulch just a little west of the west discovery.

Q. What direction does that drift run?

A. Runs about west.

Q. How far did you run it, about?

A. I don't remember, about 8 or 10 feet, or such a matter.

Q. How large is the drift?

A. Oh, it was only just a small drift, only about three feet and a half high.

Q. You say that hole which was made in 1886 is covered up now? A. Yes, sir.

Q. How long did it take you to run that drift?

A. Well, I can't say exactly, because—we did one hundred dollars' worth of work on it.

Q. How many men did you have, and how long did you work upon that drift?

A. We worked upon the drift and cut there—I can't say how many days we worked on that drift.

Q. You don't know how many days you worked there?

A. No.

Q. And you don't know how many men you worked?

A. I worked two men.

Q. That was in 1887? A. Yes, sir.

Q. In 1888, where was any work done on that claim?

A. In 1887; you asked me the question in regard to work done on that drift; in 1887, we timbered the shaft down there in 1887; we started in in 1885 and 1886, and in 1887 we worked in the shaft and retimbered the shaft.

Q. What shaft was that?

A. The first discovery shaft.

Q. That was retimbered in 1887?

A. Yes, sir; we went from the bottom with four sets of timbers—we timbered down to the bottom.

Q. In 1888 what were you doing?

A. We cut a drift, I think. I cannot say whether or not that cut was done in 1888 or 1889, but it was when we were doing the representation work there, but I can not remember just where it was done in the shaft.

Q. Was it in 1888 or 1889 that this cutting and drifting was done?

A. Well, I would not be positive as to that; I can-

not tell you exactly where that was done, in any particular place in any certain year besides these two shafts

Q. You cannot tell then whether or not that cutting and drifting was done in 1888 or 1889—was that your answer? A. Yes; I cannot tell exactly.

Q. Can you tell us what other work was done in 1888 or 1889?

A. The supposition is that the cutting and drifting was done in that year; we sunk this other shaft and done the drifting; that is the shaft east of the second discovery; I cannot tell exactly the year when that was done.

Q. Was the cutting and drifting done in any one year?

A. No, sir, it was not in any one year that it was done.

Q. How many years did it take to do that?

A. I don't know, I think we were about two years; the cutting and drifting is there now.

Q. That third hole, which we have called the third hole, you say you worked down 20 feet? A. Yes.

Q. And that you did some ten feet of drifting?

A. Yes, sir.

Q. That was done in the years 1888 and 1889?

A. Well, we done our representing in each of these years.

Q. I just want to know where you did it and the time in which you did it?

A. I would not be positive as to the exact time; I know the last time we done some work in that line there.

Q. What was the last year; what do you mean by the last year?

A. The last year in which I done representing, which was in 1893; in 1894 I didn't do any representing.

Q. You did some work on that cross-cut, you say, in 1893?

A. Yes, sir.

Q. Let us come down to the year 1890; what did you do in that year?

A. We done representing on the ground.

Q. Never mind the representing; just tell me what you did?

A. I can't tell you exactly the work or the dimensions of it; I know that the representing has been done on the ground each year.

Q. Whereabouts on that claim did you work in the year 1890?

A. I don't know whether I worked right in that second shaft or not, or whether I worked in one of the cuts.

Q. You don't know where you worked in 1890?

A. No, not precisely.

Q. You were pretending to work, were you not?

A. Yes.

Q. You can't understand me when I ask, where you did the work, can you?

A. Yes, sir.

Q. Then you don't know where the representation work was done on the claim in 1890?

A. Excepting it was as I say, we put in four sets in that shaft, and I think that was in 1886; Mr. Ringeling done the work one year then; in 1887 is when I cleaned out that dirt and sand and retimbered it.

Q. You say you made these crosscuts in 1888 and 1889, and made the drift and sunk the number two shaft?

A. Yes, I would not be positive when I done the work, because sometime I worked one man in the shaft and one on the cut, and it is pretty hard to tell just when any particular piece of work was done.

Q. Where was the work done on that claim in 1891?

A. I ain't positive, because some of the places there are filled up to some extent by the tailings from the placer ground.

Q. Did you do more cutting in 1891?

A. Well, I can't say exactly whether we did anything in any particular year or not; but as far as the work is concerned, it has been done there.

Q. Then am I to understand that in 1891 you cannot tell us upon what part of the claim the work was done?

A. I know it was done there in this third shaft, or in some of the cuts in there.

Q. Well, if the work was done in this third shaft in 1891, how much work was done there, and how deep was it sunk?

A. We done some work—

Q. I mean in 1891, mind you?

A. I can't say exactly where we did the work.

Q. Did you do any cutting or drifting in 1891, and if so, how much did you do?

A. I can't tell you; I put a man to work there and timbered the shaft.

Q. Did you do any timbering in 1891?

A. I don't know whether I did or not.

Q. Then you don't know what work you did in 1891, do you?

A. Not as to any exact place; we did the work there, I know.

Q. But you don't know what work was done there in that year?

A. I did one hundred dollars' worth of work each year.

Q. But you cannot tell us where the work was done and what it was, can you?

A. Not precisely, no sir.

Q. Let us come down to the year 1892; what part of the claim was the work done on in the year 1892?

A. I ain't positive which of these places we did the work at.

Q. Can you tell us what work was done in 1892?

A. Not unless it was the continuance of some of the other cuts.

Q. The cuts and drifts were continued in that year, were they; how far were they continued?

A. I cannot say as to the exact number of feet.

Q. I suppose all that work was done down there on that claim as representation work for these years?

A. Yes, sir.

Q. We can go down there and look at the work, can't we?

A. Yes, sir.

Q. You say you bought this claim from McKinstry; what did you pay for it?

A. Mr. Ringeling done all the business in connection with the purchase.

Q. You know what you paid for that claim, don't you?

A. No, sir.

Q. Don't you know that you paid seventy-five dollars for it?

A. I don't know.

Q. That is the consideration named in the deed, isn't it?

A. I don't know whether it is or not; I don't know whether I ever saw the deed after it was recorded.

BENJAMIN TIBBEY.

Subscribed and sworn to before me this 21st day of February, A. D. 1895.

[SEAL]

CHARLES F. ROE,
Notary Public.

(For Exhibit "A," Notice of Location of Morning Star Lode Claim, see page 43.)

T. 3 N.
R. 8 W. R. 7 W

T. 3 N. R. 7 W
I 75.17
34

Township Line

M. E. No. 511 - 16.56 A

- 2.83 A.

M. A. No. 765

579°45' W 1500'

No. 4
523.900'
Lot 346

Childe Harold
Lot 170

Shaft
579 3/4 W
No. 24

HARVEY McKINSTRY

1335.75'
N 79°45' E 1500'

No. 3
153.89'
1009 M. E. No. 765
No. 2
164.25'
M. 80.0 A

Sec. 13

Sec. Cor

Sec. 18

Sec. 24

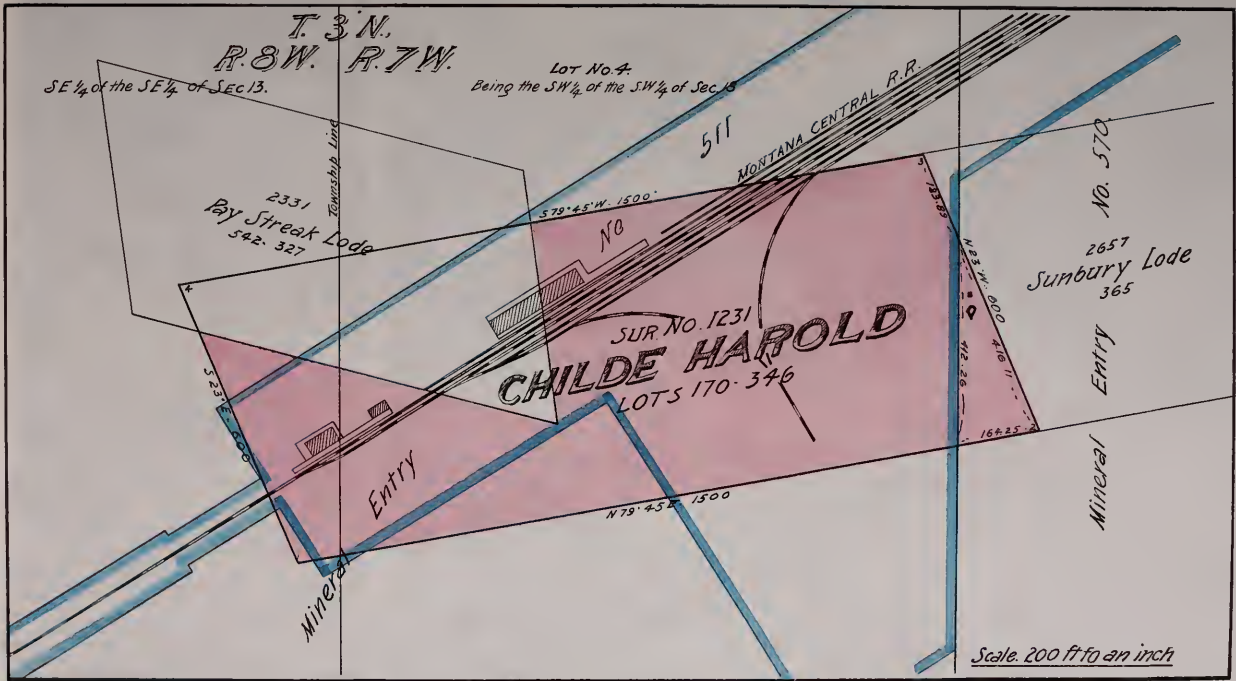
Sec. 19

Exhibit "B"

Area in conflict with M. E. No. 511 Claimant = 19.39 Acres
 " " " " " " " " = 0.76 " "
 Total = 20.15 " "

Surveyed Mar. 30th
and April 14th 1882

Exhibit "C."



Mr. Clark. In connection with the testimony of Mr. Ringeling, the defendants offer the affidavit of Thomas Overend as to the performance of the representation work upon the "Childe Harold" claim for the year 1886.

Mr. McIntire. We object to it:

1st. On the ground that it is no part of the testimony of Mr. Ringeling, and, therefore, cannot properly be made a part of his deposition.

2nd. On the ground that such affidavit is not made competent evidence by any law of the United States.

3rd. Because it is not shown by such exhibit that the same was ever recorded in the county of Silver Bow, Montana, where said claim is situated.

Affidavit marked Exhibit "D."

EXHIBIT "D."

Affidavit of Annual Labor Performed or Improvements Made on "Childe Harold" Lode Mining Claim.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

Thomas Overend, of lawful age, being duly sworn, says that he is a resident of said county and territory; that in the year 1886, between the 1st day of November, 1886, and the 1st day of January, 1887, to wit, on the _____ days of, and in said year, at said county of Silver Bow, he did and performed _____ days' labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Summit Valley

mining district, Silver Bow county, Montana Territory; that said labor and work consisted of and was done in sinking a shaft 4 x 7 x 20 feet deep, according to a contract previously entered into on said mining claim, and the character of said improvement was a shaft and platform, and the reasonable value of said work and labor done was \$100.00 dollars; that said work and labor was done, and said improvements made, at the instance and request of Nicholas B. Ringeling et al., who claimed to be the owners of said mining claim, and that the actual amount paid for said labor and improvements was one hundred dollars, and said amount was paid by Nicholas B. Ringeling to affiant for said work and labor and improvements.

THOMAS OVEREND.

Subscribed and sworn to before me this 27th day of December, A. D. 1886.

[SEAL]

FRANK RINGELING,

Notary Public, Silver Bow county, Montana.

[Endorsed]: Affidavit of Annual Labor and Improvements. "Childe Harold" lode claim, Summit Valley mining district. Filed 188 , at minutes past o'clock, m. County Recorder. By Deputy. Territory of Montana, County of Silver Bow, ss. I hereby certify that the within instrument was filed in my office on the day of A. D. 188 , at min. past o'clock m., and recorded on Page of Book of . Records of Silver Bow county, Montana Territory. Attest my hand and seal. , County Recorder. By , Deputy. Fees \$1.

[Endorsed]: Exhibit "D." Montana Central Railway Co. vs. A. F. Migeon et al. Filed April 30th, 1895
Geo. W. Sproule, Clerk.

Mr. Clark. In connection with the testimony of Mr. Tibbey, defendants offer a certified copy of the notice in lieu of representation work upon the "Childe Harold" claim for the year 1894, marked Exhibit "E."

Mr. McIntire. We object to it on the ground that it is no part of the testimony of Mr. Tibbey.

EXHIBIT "E."

Notice in Lieu of Assessment Work.

STATE OF MONTANA,)
County of Silver Bow. } ss.

To whom it may concern: I, the undersigned, for myself and in behalf of A. F. Migeon and N. B. Ringeling, the other owners of the following property, in order to secure the benefits of the Act of Congress entitled "An Act to amend section 2324 of the Revised Statutes of the United States," approved July 18, 1894, relating to mining claims, hereby give notice that I and they intend in good faith to hold and work the following described mining claim:

The "Childe Harold" quartz load claim, located January 1st, 1882, by Harvey W. McKinstry, situated in Summit Valley mining district, Silver Bow county, State

of Montana, which said claim has been regularly located and recorded as required by the laws of the State of Montana, and in compliance with the Mining Acts of Congress approved May 10th, 1872, and all subsequent Acts, and with local customs, laws, and regulations, and the location notice of which is recorded in the office of the County Clerk and Recorder of Silver Bow county, State of Montana, in Book "A" of Lode Locations, page 728, records of Silver Bow county, to which record reference is hereby made for more complete description.

[SEAL].

BENJAMIN TIBBEY.

Subscribed and sworn to before me, a notary public in and for Silver Bow county, this 21st day of November, 1894.

[NOTARIAL SEAL]

FRED M. FERRELL,

Notary Public.

STATE OF MONTANA, }
County of Silver Bow, } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 388 in book C of Annual Rep., records of Silver Bow county, Montana. Attest my hand, and the seal of said Silver Bow county, hereunto affixed this 15th day of January, 1895. C. Q. Johnson, County Clerk and Recorder. By Geo. Grummell, Deputy.

STATE OF MONTANA, }
County of Silver Bow, } ss.

I hereby certify that the within instrument was filed

in my office on the 21st day of November, 1894, at 35 min. past 11 o'clock A. M., and recorded on page 388 of book C of Annual Rep., records of Silver Bow county, Montana. Attest my hand and seal. C. Q. Johnson, County Recorder. By A. E. Whipps, Deputy.

[Endorsed]: Exhibit "E." Montana Central Railway Co. vs. A. F. Migeon et al. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

Mr. Clark. Defendants offer in evidence a certified copy of the recorded notice of the location of the "Childe Harold" quartz lode mining claim, marked Exhibit "F."

Mr. McIntire. The plaintiffs object to the admission in testimony of Exhibit "F":

1st. Because it is no part of the testimony of any witness examined on this hearing; and,

2nd. For the reason that the same is not certified in accordance with law.

EXHIBIT "F."

Notice of Location and Declaratory Statement of Discovery of and Claim to Quartz Lode Mining Claim.

"CHILDE HAROLD" LOPE MINING CLAIM,
Summit Valley Mining District, Silver Bow County,
Montana Ter.

The undersigned, who is a citizen of the United States, hereby declares and gives notice to all persons concerned

that he has discovered a vein or lode within the limits of the claim hereby located, and in said lode a vein or crevice of quartz or ore with at least one well-defined wall, and that he has this first day of January, A. D. 1882, located and does hereby locate and claim under and by virtue of chapter six, title thirty-two, of the Revised Statutes of the United States, and the laws amendatory thereto, and the laws of the territory of Montana, a mining claim upon said lode or vein, to be designated and named the "Childe Harold" quartz lode mining claim; extending along said vein or lode 1450 feet in a westerly direction and 50 feet in an easterly direction from the center of the discovery shaft (at which shaft this notice and statement is posted), and 300 feet on each side from the middle or center of said lode or vein at the surface: comprising in all 1500 feet in length along said vein or lode, and 600 feet in width, with all the rights and privileges, as to surface ground and lodes, veins, or ledges within the boundaries of said claim, and otherwise, and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes, or ledges, or within said boundaries, which are given or allowed by the laws of the United States aforesaid, or of the Territory of Montana.

The mining claim hereby located is situated in Summit Valley Mining District, Silver Bow county, Montana Territory, and is situate about three-fourths of a mile southeasterly from Butte townsite.

The adjoining claims are unknown to the undersigned.
 Claim _____ on the _____ Claim on the _____.

This location is distinctly marked on the ground, so

that its boundaries can be readily traced by a stake set at discovery shaft, where this notice and statement is posted this first day of January, A. D. 1882, and by substantial posts or monuments of stone at each corner of the claim; and the exterior boundaries of the claim, as marked by said posts or monuments, are as follows, to wit:

Beginning at a stake marked southwest corner of "Childe Harold" lode, thence 1500 feet easterly, thence 600 feet north, thence 1500 feet west, thence 600 feet to place of beginning.

The undersigned intend to hold this claim, under and according to the laws of the United States and the Territory of Montana, and to record this notice and statement under oath in the County Recorder's office of said county as provided by law.

Dated this first day of January, 1882, and signed:

HARVEY W. MCKINSTRY,
Locator and Claimant.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

Harvey W. McKinstry, being duly sworn, says that he is of lawful age, and a citizen of the United States, the locator and claimant of the quartz lode mining claim mentioned and described in the foregoing Notice and Statement of Location and Claim, and the person whose name is subscribed thereto as the locator and claimant and citizen of the United States; that he knows the contents of said notice and statement foregoing, and that the matters and things therein stated are true.

HARVEY W. MCKINSTRY.

Subscribed and sworn to before me this 2nd day of January, 1882.

[NOTARIAL SEAL]

W. O. SPEER,
Notary Public, Montana Territory.

[Endorsed]: Filed for record January 2nd, A. D. 1882, at 10:37 o'clock, A. M. A. C. Witter, County Recorder. By H. C. Bodley, Deputy.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

I, C. F. Booth, County Clerk and *ex-officio* Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument, as recorded at pages 728-29 in book "A" of Quartz Lodes, records of Silver Bow county, Montana Territory.

Attest my hand and the seal of said Silver Bow county, hereunto affixed this 6th day of March, 1888.

[SEAL]

C. F. BOOTH,
County Clerk and Recorder,
By C. W. Pope, Deputy.

[Endorsed]: Exhibit "F." Montana Central Railway Co. vs. A. F. Migeon et al. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

Mr Clark. Defendants offer in evidence certified copy of the recorded decree of distribution of the estate

of Harvey W. McKinstry, deceased, marked Exhibit "G."

Mr. McIntire. The plaintiffs object to the admission in evidence of Exhibit "G," because it is no part of the testimony of any witness examined on this hearing.

EXHIBIT "G."

*In the Probate Court, in and for Silver Bow County,
Montana Territory.*

IN THE MATTER OF THE ESTATE OF HARVEY W. MCKINSTRY, DECEASED. DECREE OF DISTRIBUTION.

Edward Stackpole, the administrator of the estate of Harvey W. McKinstry, deceased, having on the 20th day of April, A. D. 1885, filed in this court his petition, setting forth, among other matters, that all his accounts have been finally settled, and said estate is in a condition to be closed, and that a portion of said estate remains to be distributed to the heir of said deceased, said matter coming on regularly to be heard, this 29th day of April, A. D. 1885.

Upon satisfactory proof of the due publication of said order to show cause by posting in three public places for five days before said 29th day of April, A. D. 1885, as directed by this court and required by law, the said Edward S. Stackpole appearing by Edward T. McKinstry, the court proceeded to the hearing of said petition; and it appearing to the satisfaction of the court that the residue of said estate, consisting of the property hereinafter particularly described, is now ready for distribution, and that said estate is now in a condition to be closed; and

that a settlement, by agreement in writing filed in this court, has been made with all the creditors of said estate, and it duly appearing to said court that since the rendition of his said final account no money has come into the hands of said administrator and none been expended by said administrator; and that the estimated expenses of closing said estate will amount to the sum of thirty-seven and 40-100 dollars:

That the said Harvey W. McKinstry died intestate, leaving him surviving Thomas B. McKinstry, his father, sole heir at law of said deceased, and entitled to the whole of the residue of said estate; that said Thomas B. McKinstry, as such heir, has sold and conveyed, by deed duly executed, to Edward T. McKinstry, all his rights, titles, and interest in and to all the property belonging to the estate of said deceased, and authorizing and directing this court to distribute and assign all the residue of said estate to said Edward T. McKinstry, who is therefore entitled to receive and have the same; and all and singular, the law, and the premises being by the court seen, heard, understood, and fully considered; whereupon

It is here adjudged and decreed that all the acts and proceedings of said Edward S. Stackpole, administrator as aforesaid, as appearing upon the records hereof, be and the same are hereby approved and confirmed, and the residue of said estate of Harvey W. McKinstry, deceased, hereinafter particularly described and now remaining in the hands of said Edward S. Stackpole, administrator, and any other property not now known or discovered, which may belong to the said estate, or in

which the said estate may have any interest, be and the same is hereby distributed as follows, to wit:

To Edward T. McKinstry, the grantee of Thomas B. McKinstry, the whole of the residue of said estate.

The following is a particular description of the said residue of the said estate referred to in this decree, and of which distribution is ordered, adjudged, and decreed, as aforesaid, to wit:

The undivided one-fourth ($\frac{1}{4}$) interest in and to the "Mapleton" Quartz Lode Mining Claim, situated in Independence Mining District, Silver Bow county, Montana Territory, and designated in the official survey and plat filed in U. S. Land Office, with application for patent, as lot No. 233, in Township No. 3 north, of Range No. 8 west.

Also the undivided one-fifth ($\frac{1}{5}$) interest in and to the "Northern Butte" quartz lode mining claim, situate and being in Summit Valley mining district, in Silver Bow county, Montana Territory, and designated in the official survey and plat filed in the U. S. Land Office as Lot No. 197 in Township No. 3 north, of Range No. 8 west.

Also the undivided one-fifth ($\frac{1}{5}$) interest in and to the "Springfield" quartz lode mining claim, situate and being in Summit Valley mining district, in Silver Bow county, Montana Territory, and designated in the official survey and plat filed in U. S. Land Office with application for patent as Lot No. 133, in Township No. 3 north, of Range No. 8 west.

Also the undivided one-fourth ($\frac{1}{4}$) interest in and to the "Sankie East" quartz lode claim, situated in Summit Valley mining district, Silver Bow county, Montana

Territory, and designated in official survey and plat as Lot No. 163, in Township No. 3 north, of Range No. 8 west.

Also the undivided one-fourth ($\frac{1}{4}$) interest in and to the "Sankie West" quartz lode claim, situated in Summit Valley mining district, Silver Bow county, Montana Territory, and designated in the official survey and plat in the U. S. Land Office with application for patent as Lot No. 177, in Township No. 3 north, of Range No. 8 west.

Also the undivided three-eighths ($\frac{3}{8}$) interest in and to the "Plover No. 2" quartz lode claim, situated in Summit Valley mining district, in Silver Bow county, Montana Territory, and designated in the official survey and plat filed in the U. S. Land Office with application for patent as Lot No. 158, in Township No. 3 north, of Range No. 8 west.

And it is further ordered that the said E. S. Stackpole, administrator as aforesaid, upon payment and delivery of the said residue as hereinbefore ordered, and upon filing due and proper vouchers and receipts therefor in this court, be fully and finally discharged from his trust as such administrator, and that his sureties shall thereupon and thenceforth be discharged from all liabilities for his future acts.

Done in open court this 29th day of April, A. D. 1885.

(Signed) CALEB E. IRVINE,

Probate Judge.

[Endorsed]: Filed this 29th day of April, A. D. 1885.
Caleb E. Irvine *ex-officio* Clerk. Entered in Journal

“A” of Probate Proceedings at pages 424 to 426, inclusive. Caleb E. Irvine, *ex-officio* Clerk.

THE STATE OF MONTANA,)
County of Silver Bow.) ss.

I, H. A. Niedenhofen, clerk of the district court of the second judicial district of the State of Montana, in and for the County of Silver Bow, do hereby certify that the above and foregoing is a full, true, and correct copy of an order of the Probate Court of said county, in the matter of the estate of said deceased, now in my custody as clerk of said district court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 9th day of January, A. D. 1895.

[SEAL]

H. A. NIEDENHOFEN, Clerk,
By Alexander Laist, Deputy.

[Endorsed]: Exhibit “G.” Montana Central Railway Co. vs. A. F. Migeon et al. Filed April 30th, 1895. Geo. W. Sproule, Clerk.



Mr. Clark. Defendants offer in evidence a certified copy of the recorded bargain and sale deed of the “Childe Harold” quartz lode claim, from Edward T. McKinstry to A. F. Migeon, Benjamin Tibbey and N. B. Ringeling, marked Exhibit “H.”

Mr. McIntire. Plaintiffs object to the admission in testimony of Exhibit “H”:

1st. Because it is no part of the testimony of any witness examined on this hearing, and because the same is not properly preserved as a deposition;

2nd. Because it is not certified in accordance with law; and,

3rd. Because it is not the best evidence.

EXHIBIT "H."

This indenture, made the 20th day of June in the year of our Lord one thousand eight hundred and eighty-five, between Edward T. McKinstry, of Butte, Silver Bow county, Montana Territory, party of the first part, and Benjamin Tibbey, Achille F. Migeon, and Nicholas B. Ringeling, of the same place, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of seventy-five dollars, lawful money of the United States of America, to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed, and quitclained, and by these presents does grant, bargain, sell, remise, release, convey, and quitclaim unto the said parties of the second part, and to their heirs and assigns forever, all the right, title, and interest, estate, claim, and demands, of the said party of the first part, of, in, and to that certain portion, claim, and mining right, title, and property on "Childe Harold" certain ledge, vein, lode, or deposits of quartz and other rock in place, containing precious metals of gold, silver, and other metals, and sit-

uated in the Summit Valley mining district, County of Silver Bow, and Territory of Montana, and described as follows, to wit: Beginning at the southwest corner of a granite stone 15 sec. x 12 sec. x 8 sec. marked M. C. $\frac{1}{346}$ for corner No. 1 from which the corner to sections 13, 18, 19, and 24 in Township 3 north, Range 7 and 8 west, bears south 21 deg. 08 min. east 250 feet distant, and running thence north 79 deg. 45 min. east 1500 feet, thence north 23 deg. west 600 feet, thence south 79 deg. 45 min. west 1500 feet, thence south 23 deg. east 600 feet to the place of beginning, containing an area total 20.15 acres claimed by above-named party. The adjoining claims are M. E. No. 511 on the north, west, and south and M. E. No. 570 on the east. Together with all the dips, spurs, and angles, and also all the metals, ores, gold, silver, and metal-bearing quartz, rock, and earth therein; and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim, and demand whatsoever of the said party of the first part, of, in, or to the premises, and every part and parcel thereof. To have and to hold, all and singular, the premises, with the appurtenances and privileges thereto incident, unto the said parties of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL]

EDWARD T. MCKINSTRY.

TERRITORY OF MONTANA, }
 County of Silver Bow. } ss.

On this 20th day of June, A. D. 1885, before me, James W. Forbis, a notary public in and for the Territory of Montana, personally appeared Edward McKinstry, to me personally known to be the person described in and who executed the foregoing instrument, and who severally acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed my notarial seal on the day and year in this certificate first above written.

[NOTARIAL SEAL]

JAMES W. FORBIS,

Notary Public.

Filed for record June 20th, 1885, at 10 o'clock A. M.

H. S. CLARK,

County Recorder.

STATE OF MONTANA, }
 County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 436 in book G of Deed, records of Silver Bow county, Montana.

Attest my hand, and the seal of said Silver Bow county hereunto affixed this 9th day of January, 1895.

[SEAL]

C. Q. JOHNSON,

County Clerk and Recorder,

By A. E. Whipps, Deputy.

[Endorsed]: Exhibit "H." Montana Central Railway Co. vs. A. F. Migeon et al. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

[Endorsed]: No. 180. Exhibits A, B, C, D, E, F, G, and H included in depositions. Filed April 30th, 1895. Geo. W. Sproule, Clerk. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Montana Central Ry. Co. v. A. F. Migeon, et al.

At this time the parties agree, that if Mr. E. H. Wilson, a civil engineer and surveyor, of Butte, Montana, were present, he would testify that on the 7th day of January, 1895, he located the corners of the "Childe Harold" quartz lode claim, and marked the same by stakes in the ground, and that the discovery holes and shafts now upon the "Childe Harold" claim are within the exterior lines of the same.

*Circuit Court of the United States, Ninth Judicial Circuit,
District of Montana.*

THE MONTANA RAILWAY COMPANY (a)
Corporation),
Plaintiff.
vs.
ACHILLE F. MIGEON, NICHOLAS B. RING-
ELING and BENJAMIN TIBBEY,
Defendants.

Notice of Taking Depositions.

You will please take notice that the depositions of Charles Colbert, Wesley P. Emery, Richard Jones, Wil-

liam Burton, Max Mayer, William Snell, A. W. Barnard, Fred Bridenbutcher, George W. Newkirk, Levi Prentice, Valentine Kropf, George Tong, Nicholas B. Ringeling, Benjamin Tibbey, John Johnston, John Woolbater, John Noyes, David N. Upton, John Gillie and E. H. Wilson, on behalf of the defendants in the above-entitled action, to be used on the trial thereof, will be taken before Charles F. Roe, a notary public in and for the County of Silver Bow, State of Montana, at the office of Charles R. Leonard in the city of Butte, Silver Bow county, Montana, on the 15th day of January, 1895, between the hours of nine A. M. and five P. M. of that day; and if not completed on that day, the taking will be continued from day to day successively thereafter and over Sundays at the same place until completed.

And you will further take notice that the annexed is a copy of an affidavit of Benjamin Tibbey, one of said defendants, showing that the case is one mentioned in Section 678 of the first division of the Code of Civil Procedure of the State of Montana and in the Act of Congress of the United States, approved March 9, 1892, January 5, 1895.

GEORGE A. CLARK,

Counsel for Defendants.

To H. G. McIntire, Helena, Montana, Counsel for the Plaintiff.

*Circuit Court of the United States, Ninth Judicial Circuit
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM- PANY (a Corporation),	} Plaintiff,
vs.	
ACHILLE F. MIGEON, NICHOLAS B. RING- ELING and BENJAMIN TIBBEY,	} Defendants.

Affidavit for Examination of Witnesses.

Benjamin Tibbey of Butte, Montana, being duly sworn deposes and says:

I. I am one of the defendants in the above-entitled action.

II. The summons in said action has been served upon the defendants and the defendants have entered an appearance.

III. Charles Colbert, Wesley P. Emery, Richard Jones, William Burton, Max Mayer, William Snell, A. W. Barnard, Fred Bridenbutcher, George W. Newkirk, Levi Prentice, Valentine Kropf, George Tong, Nicholas Ringeling, Benjamin Tibbey, John Johnston, and John Woolbater, John Noyes, David N. Upton, John Gillie and E. H. Wilson, are material witnesses and necessary for me on the trial of said action without the benefit of whose testimony I cannot safely proceed to trial.

IV. All said witnesses reside in Silver Bow county,

State of Montana, with the exception of said N. B. Ringeling who resides in Phillipsburg, Granite county, in said State which said places of residence are out of the county of Lewis and Clarke in said State in which the testimony of said witnesses is to be used in the trial of said action.

V. I am informed by my counsel Geo. A. Clark of Butte, Montana, and verily believe that the above-entitled action is one in which the testimony of the witnesses therein above named may be lawfully taken in the form of depositions in the mode prescribed by the laws of the State of Montana, in which the said court is held, as provided by the Act of Congress approved March 9, 1892.

BENJAMIN TIBBEY.

STATE OF MONTANA, }
County of Silver Bow. } ss.

BUTTE, January 5th, 1895.

Personally appeared before me, a notary public in and for Silver Bow county, Montana, Benjamin Tibbey, personally known to me who subscribed the foregoing affidavit and made oath that the statements therein contained are true, before me.

Witness my hand and official seal at the place, day and year first above written.

[SEAL]

ANDREW T. COLLINS,

Notary Public, Silver Bow county, Montana.

Certificate to Depositions.

STATE of MONTANA, }
County of Silver Bow. } ss.

BUTTE, March 14th, 1895.

I, Charles F. Roe, a notary public in and for the said County of Silver Bow, State of Montana, do hereby certify that the witnesses, Charles Colbert, Valentine Kropf, Wesley P. Emery, George H. Tong, George W. Newkirk, John Woolbater, John Johnston, N. B. Ringeling, John Gillie, M. E. Mayer, William Burton, and B. Tibbey, in the foregoing depositions named, were by me severally duly sworn to tell the truth, the whole truth, and nothing but the truth in said cause; that said witnesses and F. W. Cole and George A. Clark, of counsel for the defendants, and H. G. McIntire, of counsel for the plaintiff in said action, personally appeared at the time and place mentioned in the annexed notice, to wit, at the office of Charles R. Leonard, in Butte, Silver Bow County, State of Montana, on the 16th day of January, A. D. 1895, and by agreement of said counsel and of all the parties interested, the place of taking said depositions was changed to the office of F. W. Cole, in said Butte, and there on the 16th and 17th days of January, A. D. 1895, between the hours of 10 A. M. and 5 P. M. on those days, the said depositions of the said witnesses were taken; that said depositions were reduced to writing by me, and when completed the deposition of each one of said witnesses was by me carefully read to said witness, and being by him corrected, was by him subscribed and sworn to in my presence.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office this 14th day of March, A. D. 1895.

[SEAL]

CHARLES F. ROE,
Notary Public in and for Silver Bow county, Mon-
tana.

In the United States Circuit Court, District of Montana.

MONTANA CENTRAL RAILWAY COMPANY,
Plaintiff,

vs.

A. F. MIGEON ET AL,

Defendants.

Testimony.

Be it remembered that the above-entitled cause came on for hearing before the Honorable JAMES H. BEATTY, Judge of said court, on April 30th and May 1st, 1895, when the following proceedings were had, to-wit:

John Gillie, a witness called and sworn on behalf of the defendants, testified as follows, to-wit:

By *Mr. Clark*, of counsel for the defendants. Q.
What is your full name? A. John Gillie.

Q Where do you reside?

A. Butte, Silver Bow county, Montana.

Q. And how long have you resided there, Mr. Gillie?

A. Since 1881.

Q. What is the nature of your business and occupation?
A. I am a mining engineer and surveyor.

Q. And have you been following that occupation continuously since you first came to Butte?

A. Yes, sir, I have.

Q. And how many years have you followed that business altogether?

A. About fifteen years.

Q. Do you know a claim in the vicinity of Butte known and called the "Childe Harold" claim?

A. Yes, sir, I do.

Q. Will you briefly tell the court about where the "Childe Harold" claim is situated, with reference to Butte, or with reference to any other point?

A. The "Childe Harold" claim is situated to the southeast of Butte, and from the center of the city about three-quarters of a mile, and the particular object from which it could be designated is the Montana Central tracks, depot and warehouse.

Q. Is the majority of the claim, or the greater part of the claim, south of the Montana Central tracks, or north of it?

A. The southeasterly portion is generally to the south of the tracks, and about parallel with the direction of the line of the road.

Q. How long have you known of the existence of such a claim, or alleged quartz claim, Mr. Gillie?

A. Since the year 1882.

Q. Have you recently been upon the claim to make a survey to locate the lines of it?

A. Yes, sir, I have.

Q. When were you there for that purpose?

A. April 17th and the 22nd, 1895.

Q. Did you on those occasions locate the exterior boundaries of the claim?

A. Yes, sir, portions of them; didn't right up at the west end. It is all built upon there.

Q. You located the eastern portions—that is the portions on which these shafts are located?

A. Yes, sir, with reference to the improvements.

Q. And did you at that time locate the improvements which you found upon the ground?

A. I did—yes, sir.

Q. And have you prepared from the data which you took at that time upon the ground, a map of the claim—that is, the easterly portion of it as they appeared there?

A. Yes, sir, I have, as represented by this tracing.

Q. This is the tracing that you prepared from the memorandum taken at the time?

A. Yes, sir.

Q. Will you describe the exterior boundaries of the claim very briefly, with reference to their general direction?

A. I will explain. I would state that the black line, shaded blue, represents the exterior boundaries of the "Childe Harold"; that the yellow lines shaded yellow represent the western portion of the Morning Star location, as pointed out to me by Mr. Charles Colbert.

Q. I will ask you Mr. Gillie, if Mr. Colbert accompanied you on the ground at that time?

A. Yes, sir. The workings upon the "Childe Harold" are represented by square marks from A, B, C, and down to G. The placer excavation in which one or two of these workings is located is also represented.

Commencing north and south to the east of discovery shaft of the "Childe Harold" is a regular blue line, representing what is known as the Parrot gulch. A red line running north and south to the west of this discovery of the "Childe Harold" represents the boundary line between placer and mineral entries numbered 511 and 570. The scale of this map is from fifty feet to an inch. The top of it is north.

Q. State whether or not, Mr. Gillie, on the occasion of this visit to the ground, you made any examination of the improvements which you found there.

A. I did, sir, carefully.

Q. Now, you may refer to your notes and refresh your memory. Will you briefly describe to the Court the nature of these improvements, commencing with the shaft or discovery hole towards the east?

A. Commencing with the discovery shaft of the "Childe Harold," which is also the discovery shaft of the Morning Star location, marked A on this map, I will state that its present condition is a timbered shaft, timbered with plank and lagging. That the timber extends above the original surface of the ground from five to ten feet. There is a windlass erected on that shaft at the present day. This shaft is four by six feet in the clear, twenty-four feet deep to the water, and you can feel down in the water to an additional depth of three feet. I should judge this shaft was deeper, because the timber apparently extends further down—perhaps twelve or fifteen feet. This shaft is irregular. The remaining distance down is slightly inclined, with the pitch of the lead to the south. The bed rock is exposed on the east

side of this shaft, and the shaft is from five to seven feet to the collar. The measurements were taken from the collar shaft marked B on this map, being about eighty feet to the west. The discovery is a timbered shaft also, being four by six feet, thirty feet deep, and timbered. The remaining depth is inclined with the pitch of the lode to the south. At the bottom of this shaft is a drift to the west, with a small cross-cut running to the south. This has water in the bottom—about three feet of water. To the west of discovery shaft is still another shaft, marked on this map C. That is about a hundred and ten feet westerly from the discovery. This shaft was pointed out to me by Mr. Colbert as having been sunk by him in 1877 on the Morning Star location. This was sunk to a depth of seven, eight or ten feet. This shaft is pointed out as his work. This shaft is now in very poor condition, being caved in at the top. It has only a depth of from five to six feet. To the west of discovery shaft another shaft—apparently a more recent one, about 165 feet from where the discovery is situated. This shaft has snow in the bottom of it, and is partially covered over. That is D. 13½ feet from the center of this shaft D, and about west is the center of another shaft marked E. It runs north and south—this shape (witness indicates). There is practically only outlines visible to-day. An opening in the placer cut to the west of this shaft shows that a drift or tunnel runs west from it. So of D, and in this same placer cut about forty feet. This is shaft marked F. This shaft is four and a half by nine by thirteen as nearly as can be measured in its irregular shape. West of

shaft E, 280 feet westerly from the discovery is a shaft marked G. This cross-cut is about six feet long, and the shaft is four feet wide, and six feet and a half pretty nearly to the top. You can just see the shape of the shaft. This was about all the improvements that are situated upon the claim. It is all that are visible at this date.

Q. That makes a total number of six shafts and excavations, or discovery holes, does it not, Mr. Gillie?

A. Yes, seven, including this drift or tunnel.

Q. What is the total distance between the original discovery, as you term it, or shaft to the east, and the excavation furthest to the west?

A. About two hundred and eighty feet.

Q. And are these shafts—discovery holes—in the same general direction with reference to each other?

A. Pretty generally to the westerly.

Q. Generally in a westerly direction?

A. Yes, sir, generally.

Q. How many of these holes and shafts that you have described, if you have knowledge of this fact, are situated within the exterior limits of mineral entry Number 511?

A. All but the discovery shaft.

Q. The discovery shaft to which you have referred?

A. Yes, sir, the original discovery being marked "A."

By *The Court*. 511 is the placer? A. Yes, sir.

Q. I will ask you whether on the occasion of these visits you made any inspection of these holes and shafts with reference to ascertaining whether or not they contained anything in the nature of a quartz claim or lode?

A. Yes, sir I have.

Q. Will you state the result of that examination? First, I will ask you a preliminary question. Have you surveyed a considerable number of mining claims in the course of your experience as a mining engineer?

A. Yes, sir.

Q. Your work since 1881 has been confined principally to the vicinity of Butte?

A. Yes sir, with the exception of one year in the Cœur D'Alene country, 1884.

Q. And in the course of your work as a surveyor in locating claims, state whether or not you have examined and seen a great many quartz veins?

A. Yes, I have.

Q. Do you consider from your experience in mining affairs that you are able to tell what is commonly meant in mining parlance by a vein or lode when you see it?

A. Yes, sir.

Q. Now you may continue, if you please, and describe what evidences if any you found of such a vein or lead in these various lodes?

A. On this discovery shaft, immediately to the east of it, a hole or excavation is cleared out into the bed rock, exposing a lead the full width of the shaft, possibly going in both directions north and south a considerable distance, yet it is at least exposed to a width of 4 to 5 feet. Going down this shaft this lead is plainly seen where the lagging is removed, which it is in some places, right to the bottom or to the water.

Q. On which side, if you remember, is the lagging removed?

A. On both sides. This is a good strong lead; it is

impossible to state whether its walls are shown in either direction there, north or south. That is mineral-bearing, I know from having taken samples and had them assayed.

Q. What is the nature of the vein where the lagging is removed in that shaft?

A. The general formation in which this lead is situated is granite, as all the Butte district is. This lead at the surface and pretty near to the depth to which it can be seen there is the usually oxidized bronze ores that are common in the Butte camp. In this one, in addition to that is a greenish copper stain, very prominent in some places.

Q. Let me interrupt you—you say this is brown ore such as you commonly find in the Butte camp?

A. Yes, sir.

Q. State whether or not you have ever seen any veins upon which locations were made that contained matter similar to the material you saw in this shaft?

A. Yes, sir, 2 or 300 feet, going north and south from this claim in the vicinity of Butte, you can find the identical showing, not in all cases with as strong crop-pings exposed as here.

Q. With reference to this shallow excavation that you say has been made right east of this first or discovery shaft, was that apparently made for the purpose of disclosing whether or not the vein came to the surface?

To which question counsel for plaintiff objects.

Question withdrawn.

Witness. I would state that this excavation you speak

of is simply a cleaning out; it is really a part of the shaft. It is not noted as a separate improvement, and is really a part of the shaft to the east, outside of the timber.

Q. Do you remember whether at that point you saw a claim which indicated to you the existence of a wall?

A. It looks, as I say, in some places at the top and also down the shaft, as though it might be a wall, but it would require further development to determine that. I think the lead in that vicinity is very large, and the wall is not exposed there.

Mr McIntire. Where?

A. That shallow excavation, right at the discovery shaft.

Q. State whether or not in this vein matter at that time you noticed the green stain of which you speak?

A. As you go down the shaft it is noticeable in many places.

Q. But as I understand it, you did not notice it in the shallow excavation?

A. At the bottom of that excavation, which is about five or six feet from the top of the bed rock, there are some small stains, small pieces of stain.

Q. Now, will you describe as to the second discovery hole there, what you saw, if anything, as to the existence of the vein? Designate the next one by the letter.

A. This shaft B, which is a shaft at the bottom of which there is a level to the west and a cross-cut south of that, that is apparently recent work—at least the timbering gives it that appearance. Of course, the timbering covers the lead in that shaft near the top, but

down in the level and at the bottom of the shaft to the east, the lead is plainly exposed.

By *Mr. McIntire*. We will interpose an objection to this line of testimony, the objection being as follows: that the testimony must be directed to the condition of affairs that existed at the time of the application for patent, which would be 1878, and any holes that have been dug there since that date would be inadmissible to show the existence of a vein at that time, and inasmuch as this witness has said that this second shaft which he is now talking about, is a recent one made since 1878, I do not think that anything existing in that shaft would be admissible to show the existence of matter that was there as known to the applicants for the placer patent.

Mr. Clark. I withdraw the question. You needn't testify as to what you found in any of those holes or shafts other than those which Mr. Colbert indicated to you were there in 1877—so passing on to the shaft about 110 feet from the point of discovery, west, which you say Mr. Colbert mentioned to you as the point he did work in 1877?

A. It is lettered "C." This at the present time is from 5 to 6 by 11 feet deep; it is caved around the surface. I would state that the bedrock at this place apparently raises so that it is not more than two to three feet from the original surface of the ground. The original surface, I think, is as it always was there, as shown by the placer cut to the west, the sagebrush roots and others. At the present time there is a lead in this shaft, strong, at least 4 feet wide, plainly visible on each side

of the shaft. It stands nearly vertical; as shown by the depth it is now sunk, it is mineral-bearing.

Q. Will you briefly give the reasons upon which you found that belief—that it contains mineral?

A. For the reason that I had samples from there and had them assayed.

Q. State whether or not there was anything in its appearance, the appearance of this vein matter, which led you to believe—

A. There was the usual brown oxidized ore there found in the camp and in nearly every instance from which you will get an assay.

Q. And the width of the vein at that point you state was 4 feet?

A. Yes, at least 4 feet; I will state further that on the west side of this shaft, the shaft is apparently cut into the wall; on the southwest corner it discloses what looks like a wall, more nearly so than any other part of the claim. The granite at that depth has not yet reached a very solid condition, at least it has been changed and is in its changed condition now, but I believe it to be a wall on the southwest portion of that shaft.

Q. Now, state whether or not you took any samples of the matter, the material in these veins at the time of those visits?

A. Yes, sir, I took samples from the discovery shaft and also from this shaft "C."

Q. Will you describe briefly how you took those samples?

A. The sample marked number 7—I suppose I won't give the values of these—

Q. No--

A. Was in the discovery shaft 11 feet from the collar, 14 inches; sample of the lead was taken on the west side of the discovery shaft; the lead is 3 feet or more; a portion of the lagging is removed; the only streak on this lead of 4 inches is fairly solid green carbonate of copper. This sample of 14 inches includes this 4 inches of copper.

Q. Did you take any other samples from this shaft?

A. Yes, sir, number 8, sample marked number 8, about the center of the east side of the discovery shaft, 19 feet from the collar. This is a green carbonate streak 10 inches wide; sample from this streak. Number 9 was across the east side of the discovery shaft, $14\frac{1}{2}$ feet down from the collar, a sample 38 inches wide. Number 10 was sample taken from shaft "C" on the east side, 3 feet down from the top of the bedrock; sample taken from 9 inches in width, making in all about 5 feet from the surface down and about 3 feet below the bedrock. The bedrock is high apparently at this point and the lead shows two feet from the old original surface. The bedrock as exposed in this placer excavation is over this depth, which is at the nearest point it comes to the surface from 2 to 8 or 10 feet, in that neighborhood, from 2 to 10 feet. There was another sample taken from shaft number "B"; I suppose you don't wish that; that is the recent one.

Q. No; you took no other samples from shaft "C"?

A. No, sir, just the one sample.

Q. Will you from your knowledge of quartz lodes and quartz locations and your experience in quartz mining, state whether or not the evidence of the lead or

vein which you discovered in the original discovery shaft or in shaft number "C" on the occasion of these visits was such as in your opinion would justify location, exploitation and the expenditure of time, labor and money?

A. Yes, sir, every indication shows that it is, that there is such a lead existing.

Q. In comparison with other veins in the vicinity of Butte upon which to your knowledge locations have been made, state whether it is a good prospect or a poor one?

A. It is certainly a very strong lead; a location which would warrant any quartz miner in making the location.

Q. From your knowledge of the history of quartz veins and mines in Butte, state whether or not it is not a fact that that entire district is filled with quartz veins; that is, are not quartz veins in that district, the Butte district, very near to each other?

A. Yes, sir, they occur very frequently.

By *The Court*. Parallel veins?

A. Yes, sir, generally in a parallel direction, sometimes running across one another.

Q. State whether or not from your knowledge as a surveyor, your experience as a surveyor in Butte, that entire district in the vicinity of Butte is not at this time covered by developed mines and quartz locations?

A. Yes, it is.

Q. Are there not some of them in the immediate vicinity of Butte, some of these quartz locations, that are small fractions? A. Yes, very small.

Q. In the case of those small fractions, the veins on

which they are located would be exceedingly near to each other? A. Yes, sir.

Q. I want to ask you a question or two with reference to the ground to the west, in this direction from these improvements (indicating on the map). State whether or not it is all covered with structures, buildings, or is it open?

A. It is open for a short distance, then there is an enclosure, the buildings of the Butte Sewer Pipe & Tile Co.

Q. Where is that building?

A. It is situated about 4 to 500 feet westerly from the discovery and due west of these improvements, occupying a block of ground in there possibly 200 feet square; I didn't measure the dimensions of it. I will use the map—that is about the position of the freight depot, the passenger lying some little distance to the west; the track bears in about a parallel direction to them, running as indicated by that pencil line.

Q. That point you have marked there as a placer working, is that where there is apparently water?

Mr. McIntire. That is a dry ditch.

Witness. I think you refer to the Parrot pond, a large body of water there; that is not on this ground. Westerly from this enclosure of the Butte Sewer Pipe & Tile Co. is a vacant space, probably 2 or 300 feet; then the westerly portion of the ground is pretty well covered, pretty generally covered, with structures.

Q. But with reference to the ground 4 or 500 feet between these points of discovery and the Butte Sewer Pipe & Tile Co. buildings?

A. It is not occupied at all; there are no structures of any kind; it is vacant from there to the southern portion of the claim.

Q. Just indicate to the Court that open space there not covered by buildings or any structures.

A. It would be commencing at a point about 200 feet northerly of the discovery and running to the track, and bounded by the southern track of the Montana Central, about 500 feet westerly to the enclosure of the Sewer Pipe Co. building and southerly to the southern line of the claim, that southeast corner comprising three or four acres. There are no buildings on this placer ground; there are no buildings; easterly on the other placer ground there are one or two buildings.

Q. State whether or not to your knowledge the railroad company uses this open space of which you speak?

A. No, sir; there are no tracks of any kind situated on it.

Q. Where are these discovery shafts located, roughly, with reference to the Parrot smelter?

A. Westerly, generally to the northwest slightly, about a quarter of a mile, quarter to a half mile.

Q. How are they located with reference to the line of the Parrot belt?

A. The discovery shaft is about 75 feet westerly to the old gulch, as near as it can be traced, and the other workings are westerly of that.

Q. Is the Parrot gulch a landmark there, a locality with which you are familiar?

A. Yes, sir, I have known of the Parrot gulch for a

number of years; it is nearly obliterated now with the placer excavations and railroad tracks.

Q. Can you describe, in addition to what you have already stated on the subject, why you believe that there is a vein or lode at these two discovery points, which you have testified to?

A. Not further than it can be actually seen, as it is opened up by these two openings; these two openings are sufficient to develop as good a lead as many of the locations in Butte have that proved to be good mines.

Q. If there were no location there at the present time, would you make a location on it yourself?

A. Yes, sir. I consider it valuable enough for that, yes.

Q. State whether or not you took those samples that you took out of those two discovery holes to any one?

A. Yes, I kept them in my possession from the time of taking them until I reached Mr. Sticht's assay office on Upper Main street, and surrendered them to him in person, in Butte. I have a certificate.

Q. Did you have these samples arranged in packages or in any way marked so you could tell from which points upon this ground they came?

A. Yes, I had them tagged for the assayer and numbered; then I had the numbers and notations in my pocket.

Q. And you delivered them to Mr. Sticht?

A. Yes, sir, in person.

Cross-Examination.

By *Mr. McIntire*. Q. You think you would locate that ground as a quartz lode now, do you?

A. Well, I would consider it valuable enough; really I don't make any locations in our business—it is not policy to do so, but not on account of its not being valuable; I would consider it valuable, and probably could dispose of it at a considerable figure at the present day.

Q. What would you say as to the condition of affairs down there in 1877 and '78?

A. I can't judge of that very well, only in connection with the records of that county.

Q. When did you first go to Butte?

A. In 1881.

Q. And you don't know of your own knowledge of the condition of affairs there in 1878?

A. No, sir, I don't.

Q. Now, all of this testimony that you have given about the location of claims in the vicinity of this claim is from your knowledge derived since 1881?

A. Yes, sir, with the further fact that I know the records of our county, which was then Deer Lodge county, a portion of that county show a great many quartz locations made in the camp at that time.

Q. But Butte is a very large camp? A. Yes.

Q. Were there many quartz locations made in that valley prior to 1882? A. I couldn't state.

Q. Do you know the property called the Ground Squirrel lode? A. Yes, sir.

Q. When was that uncovered or discovered?

A. I really can't say; it was probably along in 1882 or 1883.

Q. That is down in this flat where this "Childe Harold" is located?

A. Yes, probably the same character of placer ground lying to the east of the "Childe Harold."

Q. Don't you know, as a matter of fact, that these various locations made down in this flat have gotten value or supposed value since the discovery of the Ground Squirrel in 1882 or '83?

A. Certainly they had value, because I have known them to be located and represented and improvements placed on them for patent, development work done, prior to the development of this Ground Squirrel.

Q. Did you know of them being taken up as quartz locations or as surface ground?

A. I know of one to the west of this and very near to it, the North Star particularly, taken up as a quartz claim.

Q. Had there been any quartz mining done in this flat prior to the work on the Ground Squirrel, to your knowledge, any reasonable work, for the purpose of extracting ore and shipping it?

A. Not right in this neighborhood; on this same ground and as far west as Montana street, which is possibly 1500 feet westerly; I know they worked the Shonebar quite extensively.

Q. When did they work the Shonebar?

A. At different periods; I know of its location and being worked from time to time since I have been there.

Q. Since 1881? A. Yes, sir.

Q. The energetic work on the Ground Squirrel dates back only to the last four or five years?

A. Yes, sir.

Q. Prior to that time it had practically remained idle?
A. Yes.

Q. Nothing further done than mere representation work, if anything?
A. Yes, sir.

Q. Now, isn't that the condition of affairs with every quartz location located in this valley near Butte, with the possible exception of the Shonebar, which you have mentioned?

A. Yes, I know of no extensive work done there.

Q. This ground has become very valuable for surface purposes?
A. Yes, sir, it has.

Q. Since the alleged discovery it has been built up a great deal?
A. Yes.

Q. What time did the Montana Central Railroad get into Butte?
A. About 1888, I think.

Q. Now, you stated a minute ago that the western part of this "Childe Harold" is covered with structures. What do you mean by structures?

A. Residences and little buildings there occupied for residence purposes.

Q. There are a great many houses around there—little cottages?
A. Yes.

Q. Occupied by railroad employees and others?

A. Yes, sir to a great extent.

Q. And that ground around there has a value for townsite purposes—the surface ground?

A. It has had, yes, sir.

Q. You know something about the railroad business: you are a surveyor and engineer?

Q. Wouldn't that ground around these depots, and

which is covered by the "Childe Harold," be very valuable to the railroad for terminal purposes?

A. Yes, if they required the ground.

Q. Do you know of a pound of ore ever having been shipped out of this so-called "Childe Harold" location by the locators?

A. No, sir; I haven't positive knowledge; I have heard of it.

Q. As a matter of fact, there has been no work done there except for representation purposes?

A. To my own knowledge, I don't know.

Q. There is nothing down there at the best but a prospect?

A. Yes, sir; an encouraging prospect.

Q. In other words, an indication of a lead?

A. No, an actual lead.

Q. Would you call that a mine down there, with the condition of affairs now existing, or the promise of a mine?

A. In the general acceptance of the term it is not a mine, no.

Q. It is a prospect, is it not?

A. Yes, sir.

Q. Which may turn into a mine on further development work?

A. Yes, sir.

Q. You have no idea what quantity of work would be requisite to turn that thing into a mine?

A. No, sir.

Q. How far they would have to sink down to uncover anything that would be worth anything.

A. No, sir.

Q. You don't mean to say that the indications that

are apparent now are such as to warrant the belief that it could be worked at a profit, do you?

A. I don't think it could, no.

Q. When were you first on this ground?

A. 1881, I guess.

Q. You made a survey of it, or located the corners, did you not, in 1885—did you not so state?

A. I assisted Mr. Kellogg with the survey.

Q. What year was that?

A. It was along in the early '80's.

Q. Didn't you say it was '85 in your direct examination?

A. No, sir.

Q. Who is Mr. Kellogg?

A. Mr. Kellogg was deputy mineral surveyor, and the man for whom I was working was general assistant for them.

Q. He was working for Ringeling?

A. Yes, sir.

Q. Do you know of Ringeling's purchase of this property?

A. Yes, sir.

Q. Was it subsequent to or before the time Ringeling purchased this property that you were down there on this ground?

A. It was prior to Ringeling's purchase of this property.

Q. Now, that purchase, I think, was made in 1885; how long prior to the purchase could it have been?

A. It is in the year that the final survey was made: it was '82 or '83, I think.

Q. That is the year you were down there?

A. I have been there in that year and have been on the ground before the location in 1881.

Q. Is that the time you surveyed the ground and examined these various matters?

A. Didn't make any special examination at that time; the improvements were very slight.

Q. What improvements were on the ground at the time you were there in '82, if that is the year you were there?

A. I couldn't describe them now.

Q. Describe them according to your plat, if you can. Which of those holes were there at that time?

A. I wouldn't positively identify them, only having assisted in the final survey. I could say there were two holes there. One of them is the discovery; the other I am not sure of, because the character of the ground is changed there. It is marked "A."

Q. That is the discovery?

A. Yes, sir.

Q. You think that was there?

A. Yes, sir.

Q. What other hole was there?

A. I don't know. They were placer mining and there were excavations, which have changed it so I can't positively identify it. They were very small; the holes were very slight.

Q. How about that hole—C—was that there?

A. It may have been and I think it was, because the final notice was indicated.

Q. If it was there it was a slight excavation?

A. Yes, sir; a few feet deep.

Q. At the time you were there was this discovery timbered up?

A. Not as it is in its present shape; it may have

had one or two poles around it; it was not a very deep hole as I remember.

Q. The greatest depth it has now is how much?

A. As far as measured, being able to measure it, 27 feet—24 to water and three feet under water.

Q. That is the present depth? A. Yes, sir.

Q. And that hole C—the present depth is about 11 feet? A. Yes, sir.

Q. When were you again on that hole?

A. I can't state positively; I have been on the ground very many times.

Q. I mean on business?

A. I remember these lines of this placer claim cross that ground; when the Montana Central was securing their right of way, I made the description for these tracks. That would be '87, about that year.

Q. Did you notice anything on that ground in '87?

A. No, sir; not with reference to any work being done.

Q. There are various other holes on that ground, running down to the letter G—do you know when those holes, G, F and E, were dug?

A. No, sir; I do not.

Q. Were you not on that ground last December?

A. No, sir.

Q. Just prior to your examination over in Butte?

A. No, sir; that was Mr. Wilson, my partner.

Q. You testified by deposition in Butte in January?

A. Yes, sir.

Q. I remember your testimony was that you made a plat?

A. Yes, but I hadn't been on the ground myself, not for this examination.

Q. The first time then that you went on the ground for the purpose of this suit was April 17th of this year?

A. 22nd and 27th.

By *The Court*. You testified 17th before?

Witness. I mean 22nd and 27th.

Q. Of this month? A. Yes, sir.

Q. That is the time you picked your samples?

A. Yes, sir.

Q. Coming down to hole C, you picked out a sample you call number 10; how many other samples did you pick out of that hole?

A. On the 22nd I took a sample out of that from the west side, but it was assayed by a party who was unable to be here and I had to get other samples.

Q. Who was with you when you took these samples?

A. The first time I had an assistant with me named Warren; he was not down the hole with me. The second time Mr. W. P. Forbis.

Q. Any of the defendants with you down there?

A. No, sir; not on the 27th.

Q. You picked these samples without any direct instruction? A. Yes, sir.

Q. What kind of a sample did you pick there with reference to its apparent goodness?

A. Some of them—

Q. Let us keep to this letter C.

A. I took what I thought would give a good assay.

Q. That is what you call picked samples?

A. It is from a portion of the lead that would probably develop value.

Q. You didn't take any average sample there?

A. It is hard to get an average sample; I took 10 inches on that lead.

Q. Coming down to the samples you picked out of the hole "A," were you directed to pick those samples by any person?

A. I was directed to get them, but not directed what to pick.

Q. With regard to the samples you did take, what choice did you make?

A. I took a streak in one instance—I know I took a streak that ought to promise well, and then took an average sample of the whole.

Q. You took an average sample in that case?

A. Yes.

Q. And the other samples, how about them, were they picked or choice samples?

A. They would go to show that if the lead at this point, in any of its parts, would give fair returns, it would warrant development.

Q. You said this sample 7 in hole A was picked out 11 feet from the collar of the shaft? A. Yes, sir.

Q. What do you mean by the collar of the shaft?

A. That is the top part of the timbers, as they stick out of the ground.

Q. And how far below the surface of the ground would be this 11 feet?

A. About 5 or 6 feet above the ground we cribbed,

and would make it 5 or 6 feet from the original surface of the ground.

Q. Hasn't that ground been washed off a good deal in the last few years, placer mining and otherwise?

A. The original surface isn't there; it has been changed.

Q. Can you tell how many feet have been washed away in that way of that surface ground? A. No, sir.

Q. At 19 feet from the collar, then, sample A, that would be some 14 feet below the surface of the ground, allowing 5 feet for the size of the shaft where it sticks out of the ground?

A. Yes; allowing 5 or 6, it would be from 12 to 13 feet.

Q. Now, with reference to the time that you saw that hole when you were making that survey with Kellogg, would these points be deeper or shallower?

A. Some of these samples are taken from points that must be deeper, as I remember it.

Q. Deeper than the condition of affairs at that time?

A. Yes, sir.

Q. You don't know what the condition of affairs was in 1878, with reference to that hole?

A. No, sir, I don't know anything about '78 at all.

By *The Court*. When was this survey made?

Witness. In 1882 or '83—that neighborhood: '82, I think.

Q. That survey was made after the time the "Childe Harold" was located?

A. Yes, sir, it must have been.

Q. Are you the surveyor that made the survey for patent in this case of the "Childe Harold"?

A. No, sir, that is Mr. Kellogg.

Q. He is your partner?

A. No, sir, Mr. Kellogg was Ringeling's partner.

Q. Then the survey that these people are now applying for a patent on you have nothing at all to do with?

A. Yes, I assisted Mr. Kellogg at that time.

Q. Did you have anything to do with making the field-notes of that survey? A. Yes, sir.

Q. What do you say with regard to the value of the improvements on this ground when you applied for patent? A. I don't remember as to that.

Q. Don't you remember you wouldn't certify they were worth \$500?

A. I didn't have any certificate to make; Mr. Kellogg would do that; I was with Mr. Kellogg at the time and would take his field-notes and work up the survey.

Q. Mr. Kellogg is dead now? A. Yes, sir.

Q. About this hole C; what peculiarity is there about that hole C as noticed by you there either on April 22nd or 27th? Tell us how to go there and identify it? A. There is a fence around it.

Q. And does that hole not show indications of recent excavations there?

A. Yes, it apparently has; it is squared out at the bottom—at the lowest depth or bottom.

Q. It has been dug down several feet and cleaned out? A. It has been squared up some, I think.

Q. There was a lot of old trash in there prior to that time?

A. I don't know; there is some in there now.

Q. And there is a fence around it now?

A. Yes.

Q. You refer to a placer excavation there on your plat.

A. Yes, sir.

At this point Mr. Gillie was excused.

Peter M. Collins, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. What is your position?

A. Chief Clerk United States Land Office.

Q. Have you in your office any record of application for patent in regard to mineral entry number 511?

A. We have, in the shape of an entry upon the book only—that is, two entries, the entries comprising the application and the entry proper.

Q. Can you state what the substance of those entries is?

A. Yes, sir, I didn't bring the book along; I have made a note.

Q. Made notes from the book? A. Yes, sir.

Q. I will ask you what the entries of those books show with reference to this application?

A. Well, I shall just give the application and the entry in their entirety.

Q. That is what I want.

A. The first or what is designated as the Mineral Application, is M. A. 670, dated December 17, 1878; M. A. is mineral application; name of applicant, John Noyes of Butte; designated as placer in the Summit Valley mining district, Deer Lodge county; description, the southwest quarter of the southwest quarter of Section 18, the northwest quarter of the northwest quarter of Section 19, in Township 3 north, Range 7 west; the southeast quarter of the southeast quarter of Section 13; the north half of the northeast quarter of the northeast quarter of Section 24, Township 3 north of Range 8 west, comprising 134.21 acres; that is the substance of the mineral application.

Q. State whether or not from those entries anything appears to show that a quartz vein or lode was included in this application?

A. There is nothing to show upon this; all we have to guide us in this, in the application, would be the designation of the claim; if it were a lode claim, it would designate it by a name and say lode, as the John Jones lode, for instance.

Q. Can you tell from the entries in your office how this land was paid for, whether as placer or quartz?

A. The entries show that.

By *Mr. McIntire*. The stipulation covers that; the ground was entered as placer and patented as placer. We claim only as placer. That is all.

Mr. Gillie recalled for further cross-examination.

By *Mr. McIntire*. Q. With reference to that placer excavation which you say that you saw there—when did you first see that placer excavation on the ground?

A. I can't positively state; I have seen those placer excavations many times during the last 12 or 14 years, but as to that identical one, I am only positive as to having seen it the other day.

Q. You don't know when that was made, that excavation?

A. I am pretty sure it existed there before.

Q. Before the other day?

A. Yes, because it has the appearance of age.

Q. What can you say as to the comparative appearance of hole C and hole A at the same depth, with regard to the indications existing there?

A. Hole A as I stated is timbered, excepting that the lagging is knocked out at one side; this has practically the same appearance, what lead is exposed there, only there is more of it; that is the wall is not shown as it is in C.

Q. There is more stuff in C than there is in A?

A. No, I didn't state that; the wall is not exposed at all in A—what I would call the wall—and in C it is; that is, there is no timbering in C and it stands there a caved and excavated mass; with a pretty well-defined wall; in A the lagging is torn out at the side of the shaft at about the same depth, and it exposes a portion of the lead there for 24 inches wide.

Q. That is the similarity of the two appearances in the two holes?

A. There is a little more green carbonate, I believe, in the discovery than there is in the other.

Q. Is there any ore in hole C?

A. I didn't see any.

Q. You say the vein in hole C is almost vertical, has practically no depth?

A. For the depth as shown.

Q. Now, what would you say as to the depth of the vein, as you call it, in hole A?

A. It is vertical, that is, as indicated by the timbering in the shaft for 15 feet, and then the shaft takes the pitch of the lead.

Q. Pitches to the south? A. Yes.

Redirect Examination.

By *Mr. Clark*. Q. Mr. McIntire asked you with reference to your knowledge of how many quartz locations had been worked down on the flat in early years, that is, within the first few years after you came to Butte; isn't it a fact within your knowledge that there are quartz locations in Butte which were located in early years along back as far as 1881, when you first came to Butte, upon which no work but representation work has been done since? A. Yes, sir.

Q. Then it is not a fact that all the quartz locations in Butte and vicinity are developed mines?

A. No, sir, it is not so.

Q. Are there any considerable portions, considerable

areas covered by quartz locations in the Summit Valley mining district in which there are no developed mines?

A. Yes, sir, there are considerable areas, particularly now, over portions of the district, exclusively silver or predominating in silver, and not being valuable now.

Q. From your knowledge of mines, state whether or not the majority of mines can be worked at a profit from the surface, or whether the contrary is true?

A. In very few instances are the surface ores valuable; depth must be obtained in nearly every instance—particularly in copper; you have got to reach at least a water level.

Q. According to your judgment, would the fact that a vein at or near the surface did not show evidence of mineral deposits in any great value, necessarily indicate that further down it might not be a valuable claim?

A. No, sir, it is generally considered in the Butte district, that a man having a lead—the stronger showing, the better—practically all it needs to make it a mine is development work; there are very few failures there.

Q. On these occasions of these visits, state whether or not you took a sample of ore from the vein in either one of these two discovery shafts?

A. Yes, sir, I did.

Q. You have got the samples with you?

A. Yes, sir.

Q. Have you them here? A. Yes, sir.

Q. Produce them. (Witness does so.) Will you tell the Court from what point on these premises you took those samples?

A. This sample was taken from the east side of the

discovery shaft, from a streak that is nearly 6 inches wide—about the center of the east side of the shaft—20 feet from the collar, about 13 or 14 or 15 feet from the original surface.

Q. What would you say that green stuff indicates, if anything? A. It indicates copper.

Q. Did you take any other samples from either of these discovery points? A. No, sir, no samples.

We offer that in evidence and mark it Exhibit "1."

Mr. Clark now asked that an exception be entered to the ruling of the Court in excluding evidence of the witness' examination of the shafts and holes on these premises other than these two discovery holes, and as to whether he took any samples from those other shafts or holes, and whether he found in them any evidence of a vein. Mr. Clark stated that that evidence might become material in showing that these shafts were in the same general line with the points of discovery, and thus establish the existence of a vein.

Request granted. Exception entered.

Recross-Examination.

By *Mr. McIntire*. Q. You say that is 20 feet from the collar where you picked that up?

A. Yes, I think so.

Q. You say it is 14 feet from the original surface?

A. 14 to 15 feet from the original surface, yes.

Q. What do you mean by the original surface, the surface as it existed in 1877, when this location was made, or the surface as it exists there now?

A. Yes, the surface as near as I could ascertain both

from Mr. Colbert and others and an inspection of the ground as to what the surface of the ground is or was at the time this shaft was cribbed—it is timbered or cribbed above this point at a certain distance—

Q. What do you mean by the words “original surface”—the surface as it is there now or the surface as it was at the time of location?

A. I mean from the bedrock, the surface.

Q. Then you mean this sample was picked out from a point 14 feet below the bedrock?

A. Yes, about 14 feet below the bedrock.

Charles Colbert, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. What is your full name?

A. Charles Colbert.

Q. You reside in Butte, do you not?

A. Yes, sir.

Q. And are you the same Charles Colbert who gave testimony in Butte in the form of a deposition about this same case? A. Yes, sir.

Q. Now you remember, perhaps, in your testimony given in Butte a short time in this case that you told about making a discovery of a vein on what you called the Morning Star location? A. Yes.

Q. And you remember you also testified as to having made, in addition to your first discovery shaft or dis-

covery hole, you made another one some distance to the west of the first one?

A. About 3.75 feet I made another discovery right on that same lead.

Q. You know Mr. John Gillie, who testified this morning? A. Yes, sir.

Q. Have you been on the ground in dispute lately with Mr. Gillie? A. Yes.

Q. And when was it you were there with him—about when—I don't care for the exact date?

A. About a week ago; I couldn't say exactly the certain day; about a week ago.

Q. You went over the ground with him at that time?

A. Yes, sir.

Q. You talked with Mr. Gillie, did you, about these various shafts and holes on the ground there?

A. Yes, I showed him the discovery shaft and the next shaft.

Q. Now, this is the map that Mr. Gillie made from his examination of the ground that time you were down with him, as he testified this morning. I wish you would look at it.

A. That is not exactly the Morning Star what I located, is it?

Q. This blue here is the "Childe Harold"?

A. Yes.

Q. And this yellow represents the Morning Star—not all of it, but part of it?

A. Yes, on the east end. There is about 770 feet, 700 and some feet, from the east end, that this "Childe Harold" takes in on the west.

Q. These points here marked G, F, E, D, C, B and A, Mr. Gillie says, represent the shafts or holes on the ground? A. Yes.

Q. Point out your discovery on that map?

A. The discovery I made on the Morning Star is here.

Q. Do you remember about the date when you discovered the vein there, the year and day of the month as near as you can.

A. I believe that must be the 2nd day of July, 1877; I may be right, I may be a little bit wrong, not much wrong.

Q. About that day?

A. The second day of July.

Q. Now, did you in addition to that first hole, did you dig any other hole on the ground there in that year 1877?

A. Yes, I dug that second one here; that is between 75 and 100 feet west; I wouldn't be certain.

Q. Which would you say from this map was the second discovery?

A. This one here between 75 and 100 feet west of this discovery shaft I sunk; I didn't measure it, but I thought so.

Q. About how deep did you say you dug it in 1877, that second one?

A. Between 8 and 10 feet, I sunk that second one.

Q. Tell the court briefly what you found in that second hole, if you found anything, in 1877?

A. I had a well-defined lead after going two feet deep on the surface. I had a well-defined lead, that was

brown ore, in the shaft where I sunk, brown ore until I got between 9 and 10 feet deep, then I struck green ore.

Q. Can you give us any idea—do you remember what you uncovered, the whole width of the vein?

A. Yes.

Q. About how wide was it to the best of your recollection?

A. The second hole was about 3 feet wide; about 3 feet when I uncovered the surface there; the vein 3 feet wide.

Q. Do you know what a wall is? A. Yes.

Q. State whether or not you saw any walls there?

A. A granite wall.

Q. One or two?

A. Two—I had two granite walls.

Q. Did you in 1877 excavate this hole sufficiently to be able to tell what the direction of the vein was?

A. Yes.

Q. What was the direction?

A. It was a little west and a little bit north and east, a little bit of south; the vein was—

Q. Could you tell from what excavations you made in this hole in 1877 what the dip of the vein was?

A. I don't know for certain; you see I am not posted in what they dip; that runs kind of in an angle, that way (indicating); not very much dip; like my hand is now; the degree I don't know.

Q. Which direction did it dip?

A. It dipped south.

Q. In your evidence before you said something about

a man named Bridlebutcher and giving him some ore from this claim, the Morning Star, didn't you?

A. Yes, sir.

Q. Do you remember where you took that ore from that you gave him?

A. From the top, about 6 or 7 feet deep.

Q. From what point, from what hole did you take it?

A. On the discovery.

Q. On the original discovery?

A. On the original discovery, yes; I sampled it and I took a little piece from the old lead; the lead on the discovery was between 4 and 5 feet wide.

Q. That is the first discovery?

A. Yes, that is what I call my discovery.

Q. Do you remember ever having given Mr. W. P. Emery any samples of ore from any of these holes?

A. No, I don't remember that, I may have; he was there lots of times; down there when I had that shaft sunk; I never remember it.

Q. Did you do any work on this second discovery hole, the one further west in 1878? A. Yes, sir.

Q. What part of the year 1878?

A. That was after I got placer mining; I should say, let me see—in October we were through placer mining there, and then I went to work on this shaft.

Q. Can you see these letters on these shafts or holes?

A. Yes, sir.

Q. There is G and F and E and D and C and B and A; now put your finger on the second hole that you dug there in 1877?

A. I couldn't swear positively; I should say it was this one.

Q. What is that one marked? Look at the letter on it!

A. "C."

Cross-Examination.

By *Mr. McIntire*. Q. You think that hole marked "C" on the plat is the second hole that you dug?

A. Yes, that is the second hole; I couldn't swear positively; I tell you as I said before, it is between 75 feet and 100 feet west of the discovery shaft I had there, and I always stick to it; I couldn't be exactly positive at all.

Q. Were you not on that ground?

A. Yes, I am satisfied that is the ground.

Q. Were you not on the ground with me a short time ago?

A. Yes.

Q. Didn't you tell me that that hole "C" was not your hole?

A. Yes, I told you that; then I commenced to think that over; that hole which I sunk, there never was a stick of timber in it, and this hole was timber in it.

Q. Then you changed your mind about that?

A. Yes, between 75 and 100 feet west of that discovery shaft.

Q. Now you are pretty certain that that hole marked "C" is the second hole you dug?

A. No, I am not exactly positive at all; no, sir.

Q. How many holes did you ever dig on that ground?

A. I dug two holes.

Q. You say you dug the discovery in 1877?

A. '77.

Q. All of it? A. No.

Q. You worked on it another year?

A. Another year.

Q. What year did you work on it? A. '78.

Q. Now, how deep did you dig it in 1877?

A. About 5 or 6 feet deep.

Q. And how much deeper did you dig it in 1878?

A. Then I dug it from the surface on to about 14 feet, between 14 and 16 feet.

Q. It never was deeper than 14 to 16 feet from the surface? A. No, sir.

Q. On the surface, how much was there above bed-rock? A. From one foot to 5 feet.

Q. How much was there around this hole?

A. Right where I made the discovery, that was about 5 feet deep from the surface when I struck it.

Q. Now, you say you started that second hole in 1877? A. Yes.

Q. How deep down did you dig it?

A. About 3 or 4 or 5 feet, I wouldn't be certain; about 5 or 6 feet deep.

Q. How many days did it take you to dig it?

A. I don't know.

Q. Who worked with you? A. No one.

Q. You worked alone? A. I worked alone.

Q. Wasn't that hole only a couple of feet deep?

A. No, sir.

Q. You heard Mr. Zenn testify over in Butte in this case? A. No, sir.

Q. When did you work again on that hole, the second hole?
A. In 1878, both of them.

Q. You worked on both of them?

A. In 1878 I worked on both of them; I got an assay in 1878; before then I ran it down as far as I could.

Q. Did you give that sample to Bridenbutcher while you were sinking that hole in 1878?
A. Yes.

Q. That is the time you were sinking the hole?

A. Yes.

Q. The time you gave the sample to Bridenbutcher?

A. Yes.

Q. And you think Bridenbutcher carried that sample up to Mr. Meyer?

A. I am satisfied of it.

Q. Then the time that Mr. Meyer got that sample from Bridenbutcher must be the time about when you were sinking that hole?

A. Yes, probably a little before.

Q. In other words, you were sinking that hole after you had given the sample to Bridenbutcher?

A. No, sir, I was giving that sample to Bridenbutcher after I had sunk the hole.

Q. How many days before the time you gave that sample to Bridenbutcher was it you had been sinking that hole?
A. I couldn't tell exactly how many days.

Q. About how many approximately?

A. We were there 15 days.

Q. You think it was 15 days?

A. Yes, we were there fifteen days; I wouldn't swear to it.

Q. It may have been less?

A. A little less or a little more.

Q. Had you dug that second hole at the time you gave this sample to Bridenbutcher?

A. Yes, the second hole I had dug already, too.

Q. In 1878? A. Yes, 1878.

By *The Court*. Do I understand he had finished his work in 1878 before he gave his sample?

Witness. Yes, that is what I said.

Q. Then you had finished all your work for 1878 at the time you gave this sample to Bridenbutcher and he gave it to Meyer? A. Yes.

Q. You are certain of that?

A. I am certain of that.

Q. What was that work you were doing in 1878, for what purpose?

A. I wanted to know what was there.

Q. It was your representation work? A. No.

Q. Did you do 100 dollars' worth of work there in 1878? A. Not quite; no.

Q. You think you sunk that hole, that second hole, 9 feet or 10 feet, in 1878?

A. Yes; I sunk portions of it in 1877, and a portion of it in 1878.

Q. And the work you did in 1878 brought it down to 9 or 10 feet? A. About 10 feet.

Q. Did n't you testify in Butte that the deepest you ever sunk it was 8 feet? A. No, sir.

Q. Is n't that your deposition here?

A. From 8 to 10 feet.

Q. Do you recall your deposition in Butte?

A. I don't know.

Q. Now you think that hole was 9 or 10 feet in 1878? A. Yes, sir.

Q. Has any digging been done in it since 1878?

A. Yes.

Q. How many feet has been dug since 1878?

A. I don't know for certain how deep they are.

Q. It is n't more than 10 feet now, is it?

A. It is 12 anyhow.

Q. You did n't measure it? A. No.

Q. You are just guessing at this?

A. Yes, but I am a pretty good guesser.

Q. Those surveyors who surveyed that ground down there and measured it—measured the depth of those holes—ought to know? A. Yes sir.

Q. One of them says it is 10 feet and another says 11 feet; now you know them?

A. Yes; I didn't measure it myself.

Q. How far down in the second hole was it until you struck this green stuff?

A. A little after 8 feet.

Q. You didn't get any until you got to 8 feet?

A. 8 feet and then I had the lead there.

Q. That lead is there still, I suppose?

A. That is this brown ore I got there from two feet from the surface.

Q. Let us stick to the green ore; you got the green ore down about 8 feet? A. Yes.

Q. And that green ore is there still?

A. It ought to be there.

Q. How wide was that streak of green stuff you found there? A. Anyhow two feet wide.

Q. Was it in place—was it solid in place or just little chunks? A. Solid in place.

Q. Have you seen that hole recently?

A. Yes, sir.

Q. And is that green stuff there now? A. No.

Q. It is all gone? A. It is covered up.

Q. Didn't you just now say that hole was deeper now than in 1878 when you left it?

A. There is some loose dirt in it now.

Q. Isn't the hole deeper now than it was in 1878?

A. Yes.

Q. How is that green stuff covered up then?

A. It is covered up.

Q. How is that?

A. I don't know; the hole is caved in.

Q. And yet the hole is deeper now than it was in 1878? A. Yes, sir.

Q. But it is caved in, and you can't see the ledge that was 8 feet down? A. Between 8 and 10 feet.

Q. You can't see it any more?

A. Yes, I see the hole.

Q. I am talking about the green vein, have you seen that recently? A. No.

Q. Can't see that? A. No, I have not seen it.

Q. Now compare that—what you call the discovery on the Morning Star, how did this second hole compare with it—was it the same kind of stuff you got in the first hole? A. No.

Q. A different kind of stuff altogether?

A. As soon as I uncovered the discovery shaft I had green ore right on the start, about 18 inches.

Q. And in the second hole you didn't get the green stuff until you went down 8 feet?

A. Until I was about 8 feet deep.

Q. You know that ground pretty well?

A. I ought to.

Q. Do you remember when we walked over the ground the other day, we got talking about some ditches there?

A. Yes.

Q. In the first place there was a fence around that ground?

A. Yes, sir.

Q. Who put that fence there?

A. I heard that it was the Montana Central Railway Company.

Q. That fence marks the eastern line of the Noyes & Upton placer ground?

A. Yes, sir.

Q. That would be along this colored line?

A. Yes, sir.

Q. That fence is just west of your discovery hole?

A. Yes, sir, that is about 25 feet; from 20 feet to 30 feet west.

Q. Right on the west side of that fence is a ditch?

A. Yes, sir.

Q. Quite a ditch, running up through the Montana Central railroad track?

A. Yes, there is a cut there.

Q. Who dug that cut?

A. Mr. Noyes.

A. And when was it dug?

A. In 1886.

Q. West of that hole that you say was your second discovery, and which is marked on this map as C, there is another cut, or ditch?

A. Yes, sir.

Q. Who dug that one?

A. I did.

Q. In what year? A. In 1885.

Q. Now, in that ditch there are several holes or shafts? A. Yes, sir.

Q. When were they dug?

A. After I had run the cut.

Q. They were all sunk then since 1885? A. Yes.

Q. Then all the holes on that ground, with the exception of that discovery shaft of yours and that hole which is marked C on this plat here, have been dug since 1885?

A. Yes.

Q. And whom have they been dug by?

A. I seen one gentleman digging one shaft there on that east side of that last hole I ran; his name was Overend; he sunk that shaft there right on the east side of that cut that I ran in 1885.

Q. So then it must have been dug after 1885?

A. Yes.

Q. You spoke about the dip of the vein in that C hole; you know what the dip of that vein is?

A. Yes, sir.

Q. Show us again how much of a dip that vein has in that hole?

A. That hasn't much of a dip—in that dip (indicating) that vein runs.

Q. That is in hole C?

A. That dip—just exactly like my cane is now.

Q. And that is in the C hole?

A. That is in the C hole.

Q. It dips south? It dips towards the south?

A. It dips to the south.

Q. Now, tell me about the dip in that discovery hole of yours; how much of a dip has that got?

A. Just the same.

Q. In what direction does that dip?

A. South that discovery hole.

Q. You thought you had a pretty good thing when you uncovered that second hole in '77 and '78?

A. Yes, I thought so; we get mistaken sometimes.

Q. You know Mr. Hand, the surveyor and assayer and mining engineer?

A. No, I don't.

Q. Don't know Mr. Hand, who lives in Butte?

A. No, I heard about that gentleman's name.

Q. Don't you recall his coming around to visit you at your cabin?

A. Yes, there was a gentleman standing there, but I don't know his name exactly.

Q. You remember the gentlemen with me on this ground at the time I took you down there?

A. There were three gentlemen, Mr. Baker and two more gentlemen; I couldn't tell their names.

Q. Mr. Baker and Mr. Barker (?) and Mr. Hand?

A. Yes, I believe that's it.

Q. Didn't you go down to that ground one day with Mr. Hand; didn't he take you down there and have you show him the holes?

A. No, sir, not at all.

Q. Didn't he have a talk with you in your cabin?

A. No, sir, I went down there with that gentleman when you were there, but I never went with that gentleman.

Q. You wish us to understand Mr. Hand didn't have a talk with you in your cabin?

A. Yes, I don't know that gentleman's name now.

Q. You remember a gentleman coming to your cabin and talking with you? A. Yes.

Q. About what time in the month was that?

A. I couldn't say.

Q. Wasn't it the beginning of this month, about April 5th?

A. I shouldn't wonder; that is the time, yes, I wouldn't be certain.

Q. You had a talk with that gentleman that called on you in your cabin? A. Yes.

Q. And your cabin is in the city of Butte near this ground? A. Yes.

Q. Didn't you tell that gentleman, in the talk with you in your cabin, that when you sunk the second hole you didn't think you had much of a lead there and gave it up?

A. No, sir, I didn't say that, never said that; I always tried to preserve that lead.

Q. I will have to strike out the words "give it up"—Question repeated without those words.

A. I didn't use any such language.

Q. You are positive of that? A. I am positive.

Redirect Examination.

By *Mr. Clark*. Q. You have had a good many people down at your cabin to see you about this business?

A. A good many.

Q. You didn't know them all, the names of all?

A. I don't know their names at all; there are people coming there to me—I have been living there so long in

that vicinity of Butte City, they come there and I don't know their names.

Q. Have you taken a sample from any of these holes lately, a sample of what you considered to be ore?

A. Yes, sir.

Q. What did you do with it?

A. I took it up to a young man on Main street, Butte; I believe it is across from the postoffice.

Q. Do you remember his name? A. No.

Q. Do you remember his business?

A. He is an assayer.

Q. You can't remember his name? A. No.

Q. Where is his place of business?

A. On the right-hand side, down on Main street; I believe that is across from the postoffice.

Q. Was it an assay office where you took this sample? A. Yes, sir.

Q. Do you know the gentleman whom you left it with? A. Yes, sir.

Q. Would you know him if you saw him again?

A. Yes.

Q. You left those samples with this man?

A. Yes, I left them.

Q. Show on the map from what point you took those samples? A. On the discovery.

Q. What is the letter on it?

A. Right close to the shaft; there is another shaft sunk on the discovery and the ore lays all outside on the east side of my discovery shaft, from the Morning Star. There is another shaft sunk there now and the

ore lays right there and I sampled the ore on the east side; I see the ore laying there.

Q. Where this hole has been dug, next to your original discovery? A. On the east side.

Q. This fence that has been built around this property here and that you told Mr. McIntire was west of your first discovery there, state where that fence is, what direction it is from the second hole, the hole C you have talked about?

A. The second hole is about 60 feet west of that fence. That second discovery I made there on that same claim of the Morning Star; about 60 feet west.

Recross-Examination.

By *Mr. McIntire*. Q. Where did you take that sample from, from the vein or from the dump?

A. From the dump.

Q. You didn't go down in the hole? A. No.

Q. You don't know how deep it came out of the hole?

A. You seen it on the east side of that shaft, on the dump I made the sample from.

Q. You don't know how deep down in the hole that sample came from? A. No.

James A. Murray, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. What is your full name?

A. James A. Murray.

Q. Where do you reside? A. In Butte City.

Q. How long have you lived there?

A. I have lived there permanently since 1878.

Q. What is the character of your business, or occupation?

A. I am mining; also in the banking business.

Q. Are you the proprietor of the James A. Murray bank? A. Yes.

Q. Do you know of a quartz claim in the vicinity of Butte, called the "Childe Harold" quartz claim?

A. Yes, sir.

Q. Will you briefly state to the Court about where it is situated with reference to any landmark you have in mind?

A. It is situated a little way southeast of the Montana Central depot.

Q. When did you first know the ground which is covered by that location?

A. I think it was along in the fall of 1881 I happened to go over this ground; I noticed a shaft, possibly 4 to 6 feet deep, such a matter; it had in it [*original record here illegible—F. D. M., Clerk*] of green copper-stained ore.

Q. This map is one that was made by Mr. Gillie of Butte. He testified that he was on the ground and that he located the boundaries of this "Childe Harold" claim and this is a map he made from memoranda prepared on the ground at that time. These little points which are lettered indicate the various improvements and holes which are there now. This little mark here indicates the course and the approximate location of the Parrot

gulch—now, do you know of a location in that vicinity called the Parrot gulch?

A. I couldn't say that I do; I never knew it as the Parrot gulch; I know where the gulch is, but I never knew it by that name.

Q. Can you indicate on that map the point which in your best judgment was the place you saw this hole or shaft when you first visited the ground; perhaps you can locate it better with reference to the fence?

A. No, I could locate it on the ground better than I could by the map. I can say this—I noticed but one hole at the time and made some inquiries afterwards as to its being represented for that year. I found it had not been represented or had information to that effect and on the first of the coming January, I got Harvey W. McKinstry to go and make out the location and I named it the "Childe Harold." I was interested with Mr. McKinstry, but it was in his name; he deeded me the interest; I never paid much attention to it.

Q. You have been interested in mining since your residence in Butte? A. Yes, sir.

Q. You own and still own some locations and some mines in Butte? A. Yes, sir.

Q. And state whether or not you have seen and examined a great many prospects? A. Yes, sir.

Q. Seen a great many veins and lodes, too.

A. Yes.

Q. Do you consider that you are able to tell from what experience you have had in that line what a vein or lode is?

A. I think I can distinguish a vein from other matter.

Q. Describe what you saw in this hole at the time you visited it in 1881 which indicated a vein?

A. The hole I should judge was about $3\frac{1}{2}$ or 4 feet wide and possibly 4 feet long, the vein 4 or 5 feet along the vein or such a matter. It seemed to me to be all ore between the walls, green copper-stained; looked very handsome; I don't know as to its value.

Q. And can you state from your recollection of what you saw there whether there was a wall disclosed?

A. Looked like very nice, well-defined walls.

Q. Do you know whether you formed any idea at the time of the direction of the vein?

A. Just about as the gentleman preceding me has described it; about as near as I could judge northwest and southeast a little.

Q. Do you remember what the apparent dip of that vein was?

A. To the best of my recollection it was almost perpendicular; might have dipped a little.

Q. At any other point on the ground, in the immediate vicinity of this hole you saw there at the time, did you see any other evidence of vein matter or of a vein, anything that would indicate in your judgment the existence of a vein?

A. I was perfectly satisfied with the showing made and made up my mind to relocate it when the time came.

Q. And you saw McKinstry and told him to go and locate it? A. Yes.

Cross-Examination.

By *Mr. McIntire*. Q. You got Harvey McKinstry to make the "Childe Harold" location?

A. Yes, sir, I took him down and showed it to him.

Q. You sent him up in 1881 to do it; you made up your mind in 1881 to have him do that?

A. Yes, sir.

Q. And the location was made early in January, 1882?

A. Either the first of January, 1882, or 1883, I don't recollect which.

Q. Don't you know as a matter of fact that Harvey McKinstry owned that ground in 1881, or claimed it?

A. No, sir.

Q. Do you know that he and a man named Valentine Kropf had bought it from some one else?

A. No, sir, he never told me that.

Q. It was public ground in those days?

A. I looked upon it as such.

Q. Had you seen it prior to 1881? A. No.

Q. Do you know when that work was done on it you saw there? A. No.

Q. You don't know that it wasn't done in 1881?

A. It didn't look to me like fresh work and I inquired about it.

Q. You say that hole was from 4 to 6 feet deep?

A. I should judge so.

Q. You can't locate the hole at all on the map?

A. I wouldn't attempt to do it.

Q. Were you on the ground after 1881?

A. Several times.

Q. I mean this particular piece of ground?

A. Yes, sir.

Q. Did you notice this hole? A. Yes, sir.

Q. And was this hole that was afterwards called the "Childe Harold," the same hole you saw in 1881?

A. I don't know what other people called the discovery; the one I have reference to containing this vein, is the one we put up the discovery notice on.

Q. And you called that the discovery hole of the "Childe Harold"? A. Yes, sir.

Q. After 1881 when were you on the ground?

Q. I went over it several times: I couldn't say positively.

Q. When you saw that hole in 1881, you say it was from 4 to 6 feet deep? A. Yes, sir.

Q. And from $3\frac{1}{2}$ to 4 feet wide? A. Yes, sir.

Q. And in what direction was that width?

A. The width was north and south.

Q. And the east and west distance was how great?

A. $4\frac{1}{2}$ to 5 feet, I should judge; I wouldn't be positive.

Q. Had the hole got down to the solid rock, the bedrock, the solid vein? A. The ore?

Q. Had the hole got down to the bedrock?

A. Certainly not.

Q. How deep had the hole gone?

A. The hole was sunk on ore.

Q. How deep was the surface ground around there?

A. The vein came almost to the surface.

Q. There was some alluvial earth around there?

A. Very little.

Q. Have you been there recently?

A. Yes, sir.

Q. Was that hole timbered in 1881?

A. No, sir.

Q. Was it cleaned at the bottom, or was there dirt there?

A. There was some dirt fallen in.

Q. How much? A. I don't know.

Q. Did your partner or yourself clean out that hole in 1881 or 1882?

A. No, sir; that is, Mr. McKinstry may have done so in 1882, but I don't know.

Q. You couldn't see the vein at the bottom of the hole? A. No, sir.

Q. It was covered with dirt?

A. Some dirt had fallen in from the surroundings probably.

Q. You didn't see rock at the bottom of the hole?

A. No, sir.

Q. It wasn't timbered?

A. It wasn't timbered.

Q. You have been on that ground recently?

A. Yes.

Q. Did you notice a fence on the ground?

A. Yes.

Q. With reference to the fence where is that hole?

A. I believe it is timbered at the present time. I merely went there to refresh my memory.

Q. With reference to the fence where is that hole?

A. The one on the west side of the gulch has got a fence around it.

Q. That big fence around that ground there?

A. There are three or four boards there.

Q. Isn't there a fence running around the ground there?

A. There is a fence, but it is a hundred yards from there. The Sewer & Tile Co. has their grounds fenced in.

Q. You saw the railroad track?

A. Have you reference to the fence around the shaft?

Q. Did you see the railroad track there?

A. Yes, sir.

Q. Didn't you see a fence close to the railroad track and running in a southerly direction, running down to the road going to the Parrot smelter and running in a westerly direction down to Arizona street?

A. I didn't pay any attention to the fence. I saw a fence there.

Q. You can't tell where that hole is that you saw in 1881 with reference to the fence? A. No, sir.

Q. Whether it is on the east or west side of it?

A. We had to drive around to get out of Arizona street; there was a fence there, but I didn't pay any attention to it.

Q. How long were you on the ground in 1881?

A. Passed over it several times.

Q. When you were examining that hole in 1881?

A. I couldn't recollect, it was a long time ago;

sometimes in making a location we stayed on the ground an hour or two and sometimes only five or ten minutes.

Q. In this instance how long were you there?

A. I couldn't say.

William P. Forbis, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. What is your full name?

A. William P. Forbis.

Q. Where do you reside? A. Butte City.

Q. How long have you lived there?

A. Since the fall of 1875.

Q. What is your occupation?

A. At present I am Collector of Revenues.

Q. What has been your occupation prior to that?

A. Mining and prospecting.

Q. How long a period of time does your experience in mining and prospecting cover?

A. Since 1874, with the exception of the time I was in the real estate business, a couple of years; outside of that and with that exception I have been constantly in that business.

Q. Are you at present a mine owner in Butte?

A. Yes, sir.

Q. State what mining properties you own there at the present time?

A. I own some 15 or 16—the Schweitzer, the Niagara, an interest in a great many other, a great many patented claims there.

Q. During your residence in Butte have you located some claims? A. Pretty near all of them, yes.

Q. Nearly all you have, you have located yourself?

A. Very near, probably all of them.

Q. Have you been in the employ of any mining companies there?

A. Haven't worked for anybody but myself in Butte City.

Q. Do you know a quartz claim in the vicinity of Butte called the "Childe Harold"? A. Yes, sir.

Q. How long have you known such a claim?

A. Since the last few days. I think I saw it first on the 26th of this month.

Q. Have you been on the premises recently?

A. Yes, sir.

Q. About what time?

A. I think I was there on the 25th or 26th, and again on the 27th.

Q. Of this month? A. Yes, sir.

Q. Did you make an examination of the ground particularly with reference to the improvements that are upon it, if any, at that time? A. I did.

Q. Now will you state to the Court the nature of the examination you made at that time and the result of that examination?

A. I examined first what I was shown was the discovery shaft and then there are four or five other smaller shafts there; I examined and took assays from the discovery and two other shafts on the ground.

Q. Did you make an examination of all these holes

with reference to ascertaining their depth, their dimensions?

A. Just a close estimate of it; I didn't measure the depth, or anything of that kind.

Q. Did you inspect this shaft furthest towards the east, marked "A" upon that map?

A. That discovery shaft? Yes, I did.

Q. State to the Court about how deep it was?

A. I should say from 20 to 25 feet down to water; just down to water, I think.

Q. Was it timbered up?

A. Yes, and timbered under water some; it may have been deeper at one time.

Q. It was about 25 feet deep down to water?

A. Yes.

Q. Did you go into that shaft? A. Yes, sir

Q. Is it timbered?

A. Yes, sir; but the lagging has been torn out on either side to a great extent.

Q. On which side?

A. Both sides; I don't know that it has been torn out on the east side, but it is out; it has been torn out on the west side.

Q. Where the lagging had been removed, state whether or not you saw any material which looked to you like vein material?

A. I did; a very pretty vein in the shaft.

Q. Describe briefly, as well as you can, exactly what you saw there, which led you to think there was a vein or vein matter there.

A. I can refer to some things here in my notes. I

took measures when I made the assays. The first sample I took was from an open cut that lays right up against the discovery shaft on the east end; I took a sample there. The vein is two or three feet there. I saw a small streak that showed mineral about 6 inches wide. I went down the shaft then between the third and fourth set; I think the sets there are about 4 feet apart and I went down between the third and fourth set, where the lagging has been cut out recently, and I took a sample there of about 13 inches in width of part of the vein I thought was mineralized.

Q. What led you to believe it was mineralized?

A. It was just my experience in mining and what I know about quartz. It was its color and the good-looking character of the ore that laid in that streak, that is on the west side of the shaft, I took this second sample; and I took the third sample down between the fifth and sixth sets, which I estimated to be between 19 feet. There I took a sample about 34 inches wide; the streak had widened out from where I took it above to about 34 inches; that I thought was mineralized. I took a sample from there. Then I took a picked sample. These samples I refer to are general samples and I took a picked sample from both sides of the shaft, from this point 19 feet in depth; that is what I considered the best ore I saw down there in that place; that is all the samples I took out of the shaft.

Q. Did you make any examination of any of the other shafts?

A. Yes, I examined all the other shafts, that is I examined the one with the fence around it and the deep

one that laid between that and the discovery shaft and two or three others that laid in or close to that cut, that was made for placer mining purposes.

Q. Describe the dimensions of each one as you found them, the dimensions of the shaft?

A. I should judge the second shaft, or the one branded "B" there, I should think it would be about $3\frac{1}{2}$ by 6 or 4 by 7 feet in the clear of the timbers and about 7 feet deep and the third one —

Q. That is what on the map there?

A. Marked "C"; it is an old shaft and from its appearance is caved in very badly; it is so caved in we could climb up and down the sides of it. I think that is about 11 feet deep and the hole marked "D" was covered up with boards; I didn't go down in that—didn't make any particular examination of that at all, but "E" and "F" I examined just casually; I didn't make any critical examination.

Q. To call your attention to this hole or shaft marked "C," did you go down into that? A. I did.

Q. Did you make a careful examination of it?

A. Yes.

Q. State what you found in that hole marked "C"?

A. There is a very pretty vein in that; I should say the vein matter is from 3 to 4 feet wide and I sampled about 13 or 14 inches of ore out of that shaft on the west end.

Q. And at what depth from the surface did you take those samples?

A. I didn't take it right from the bottom because it

was not handy to do so; it was say, 8 or 9 feet from the surface.

Q. You took it from a streak in the vein?

A. Yes, sir.

Q. Why did you take it from that streak?

A. Because I thought that was a pay streak, if there was any in the vein.

Q. Did you in this hole C notice anything which appeared to you like a wall?

A. I think the walls were better defined in that wall than any other I saw possibly, unless it was the one marked B at the bottom.

Q. State whether or not these walls were well-defined in this hole "C"?

A. The south or hanging wall was well-defined; yes, sir, that is the granite was there; I couldn't say it was a wall, but it is what might be termed a wall.

Q. You know from your mining experience what a wall is?

A. Yes, sir, but there is sometimes granite horses appearing in a lead that you might mistake for a wall, that might prove not to be one; this might be one of several horses. I rather think that is the case.

Q. State what is your best judgment in regard to it, whether there was a wall there or not.

A. I would call it a wall until I proved it not to be.

Q. What is the material contained in this vein?

A. It is oxidized quartz.

Q. What is its color? A. It was dark brown.

Q. You say you have seen a great many veins in the city of Butte that have been located?

A. I guess pretty near all of them.

Q. State whether or not you ever saw anything upon which a location was made in the vicinity of Butte, where the vein matter resembled what you found in that hole C?

A. They all resemble that, the general character of the vein that runs all through that camp there, that is, there are two distinct characters of vein in Butte; one resembles the manganese veins in looks, but it is about the same structure you might say.

Q. Did you take any samples other than those you have described from any of these holes?

A. No, sir, I think not; I took these samples from there.

Q. This material you say you saw in the hole C—state whether or not from your knowledge of veins in Butte and vicinity, it did or did not indicate that further down it might or might not carry copper?

A. I should judge it might; yes, I think it indicated copper.

Q. Do you know a developed mine in Butte called the Mountain View? A. Yes, sir.

Q. Is that a patented claim?

A. Yes, it is a patented claim now.

Q. Do you know who owns it?

A. It is owned by the Boston & Montana Mining Company.

Q. When did you first know the ground covered by that Mountain View mine?

A. I have known it ever since I went there in 1876,

ever since 1876 I should think; I at one time owned it myself.

Q. When did you own it?

A. I can't give you the exact year; it was early in the 80's anyhow and possibly in 1879.

Q. Do you know what that mine produces?

A. No, sir, I couldn't tell you; I know that it produces copper.

Q. It does produce copper?

A. Yes, sir, copper and silver.

Q. Did you locate it originally, yourself?

A. Yes, I with another party, two of us owned it at one time.

Q. That is generally regarded in Butte as a paying mine, a good mine?

A. Yes, considered one of the best.

Q. Now, when you located the Mountain View claim originally, state what sort of a cropping or what sort of a vein you disclosed that you had to locate upon?

A. At that time there was none of those copper mines being worked to any extent, with the exception possibly of the Parks Parrott, which laid right opposite, and we got our idea of the copper croppings of the camp from the cropping on these veins. I have had several assays from there where I got no tracing at all from it, showed no discoloration: it was simply what they called there in Butte a copper blossom.

Q. What is a copper blossom?

A. I can hardly tell you. It is a peculiar cropping of a copper lead; that is all I know about it.

Q. How did the surface indications you found when

you located originally the Mountain View compare with the veins which you say you saw in shafts A and C upon this "Childe Harold" claim?

A. They didn't compare with these veins at all in assays at that depth. These veins are much better than they were on the Mountain View.

Q. Do you know whether prior to 1880, there had been any claims located in Butte which have since developed to be valuable copper mines.

A. Yes, sir.

Q. State whether or not, if it is within your knowledge, that prior to 1880, the whole vicinity of Butte was taken up with locations?

A. Well, pretty much all of it was taken up at that time; very few locations made since then.

Q. From your knowledge of mining, is it or is it not true that the majority of mines pay the expense of development from the surface?

A. My experience has been that they do not pay the expense from the surface—I mean in sinking or anything of that kind.

Q. From your knowledge do all veins, located veins, carry paying quantities of mineral from the surface down?

A. I don't know of a copper vein in Butte that does; there may be some silver veins there that pay from the surface down.

Q. As a mining man, would you or would you not say that these veins which you say you discovered or saw the other day in shafts A and C on these premises, would or would not justify exploitation?

A. They would justify it.

Q. Would you consider them, as a mining man, a sufficient foundation for the making of a location?

A. Yes, sir, a good one.

Q. With reference to these samples which you have testified you have taken from these shafts, what disposition did you make of them?

A. I took them right straight to Mr. Sticht's assay office and turned them over to him personally.

Q. Did you mark them in such a way that you could identify them?

A. Yes, sir, I marked the samples with a tag and put them in the sack, and I also kept a record of them in a small book.

Q. Did these pieces of paper which you placed in the separate packages, state from what shaft the samples came?

A. No, sir, but I kept a record of where they came from in my book.

Q. Can you by numbers or any other way tell us the points from which you took those samples?

A. Yes, I can tell exactly from where I took them. Number 1 as I said before, came out of just west, out of the cut, just west of the discovery shaft, the part of the shaft not included in the timbers, in fact about 5 feet from the surface.

Q. You have testified about that before—whom did you give those samples to? A. Mr. Sticht.

Q. What is Mr. Sticht's business?

A. He is an assayer.

Q. In Butte? A. Yes, in Butte City.

Cross-Examination.

By *Mr. McIntire*. Q. You think this prospect down there would justify exploitation? A. Yes, sir.

Q. Further development work? A. Yes, sir.

Q. And exploitation also you say?

A. No, I don't think I did.

Q. You mean to say exploration?

A. Yes, sir.

Q. That is what we commonly call development?

A. Yes, sir, that is what I mean by it.

Q. And you predicate your opinion on the state of affairs as it now exists in Butte, do you not?

A. No, sir, not altogether.

Q. What do you predicate it upon?

A. Upon the state of affairs that have always existed there.

Q. And such prospects as you have in this place now would have justified exploitation and exploration at any time since you have been there?

A. Probably not, on account of the means of working copper at that time.

Q. You say affairs have changed materially in Butte during the last few years as to the cost of mining?

A. Yes, sir.

Q. Railroads have come there? A. Yes.

Q. When did the first railroad strike Butte?

A. I don't know.

Q. Didn't the Utah Northern get there in 1881 or 1882?

A. You say it did. I remember it got there, but when I don't know.

Q. You lived there in 1881?

A. Yes, sir; and that was the first railroad I ever saw.

Q. That was a narrow-guage road? A. Yes.

Q. And now has been changed to a broad-gauge, a part of the Union Pacific system? A. Yes.

Q. When did the Montana Central R. R. get there?

A. I couldn't give you the date as to when it got there.

Q. About '88 wasn't it?

A. I should imagine about that, as near as I can remember.

Q. Things have become very much cheaper—machinery, supplies, etc., since the railroads have come there than they were before? A. Everything is cheaper.

Q. Mining there is cheaper?

A. As far as supplies for miners are concerned, they are, but their wages are not.

Q. Labor remains about the same?

A. About the same.

Q. So what might justify exploitation now, would not necessarily have justified it before the railroad got there? A. Not in copper, no.

Q. This stuff in the "Childe Harold" is copper?

A. Yes.

Q. That is a copper vein if it is anything at all?

A. Yes, I consider it valuable for that.

Q. And for nothing else?

A. I should hardly think so.

Q. You referred to a well-known mine in Butte, the Mountain View, situated on the hill there, on the mountain?
A. Yes, sir.

Q. And this "Childe Harold" is situated in the bottom?
A. Yes, sir.

Q. How far is the Mountain View from this "Childe Harold"?
A. Probably three quarters of a mile.

Q. As a matter of fact haven't all the valuable mines of Butte been found on that hill?

A. No, I don't think so.

Q. The large majority certainly have been found up there?
A. In number, not by a good deal, no.

Q. Where is the Anaconda mine?

A. It is on the hill: it is not the same hill as the Mountain View, not exactly, no.

Q. All the great mines of Butte, those that are so famous, the Anaconda, the Parrott and others, are on that hill with the Mountain View—they are all on the top of the mountains?
A. No.

Q. Do you know of any large producing vein in this falt you speak about?
A. Yes.

Q. Which one?

A. That is, there have been large producing veins.

Q. Which one?
A. The Ground Squirrel.

Q. When was that located?

A. I didn't keep a record of the locations there.

Q. I understood you to say a minute ago that you had visited all the mines of Butte!

A. Yes, sir, but I couldn't tell when I did it!

Q. As a matter of fact, was there ever a vein down

in that valley worked prior to the time the Ground Squirrel was worked? A. Yes.

Q. Which one? A. The Belmont for one.

Q. When was the Belmont located?

A. I don't know.

Q. You know, I suppose, that the Belmont has never proved a success?

A. No, I don't know anything about it.

Q. Don't you know that any person that ever took a lease on the Belmont had to throw it up, couldn't make it pay?

A. No, I know it was leased by several different parties, but I haven't inquired into it.

Q. Now the work done on the Ground Squirrel and Belmont has been done only in comparatively recent years—the last five or six years as a matter of fact?

A. I rather think so, say, maybe 6 or 7.

Q. In other words, they have been developed since the coming of the Montana Central?

A. I rather think they have.

Q. Now, you say that Butte was pretty well plastered over with locations at the time you originally went there? A. No, not the time I went there.

Q. What time did you fix that?

A. I think I said in 1882, I don't remember; I think it was in 1881 or '2, I answered that question.

Q. Now, with reference to this country down around the Montana Central R. R. were there many quartz locations down there as far back as 1881 or '82?

A. I never paid much attention to them; I don't think there was.

Q. Nobody else did, did they?

A. Yez, a good many had locations there.

Q. It was a well-known placer ground down there?

A. It was used for that purpose when I first went there.

Q. And had been quite valuable placer grounds, very productive?

A. I can't tell you about that.

Q. You spoke about a copper blossom as indicative of copper mines, etc., did you find any copper blossoms in this hole marked C?

A. There is ore there that I think would turn into copper.

Q. Is there anything down there you would call a copper blossom?

A. Yes, I guess there is, I don't know that I would exactly call that one because it is in the vein; I had reference more particularly to float, that is a term used by miners and it is hard to describe what is meant by it.

Q. As a matter of fact this copper blossom became prevalent over there after they began to locate copper mines?

A. They began to locate copper mines prior to my going there.

Q. Did they locate them for copper or silver?

A. Now, I couldn't tell you.

Q. Isn't it a fact about many of the mines in Butte, that they were first located as silver mines and then developed later on as they went down into copper?

A. I can't tell you about that: when I went there in

'76 Billy Parks was working a copper mine and shipping the ore.

Q. Was he shipping it for copper or silver?

A. Copper.

Q. What mine was that?

A. That was just about where the Parrott and the Ramsdell Parrott is.

Q. That went pretty high in copper?

A. I don't know.

Q. That was the only copper mine worked in Butte?

A. I think that was the only one at that time.

Q. You must be acquainted with the Alice and Lexington mines? A. I know their locations.

Q. Were they not originally silver mines and not copper? A. Yes, considered that.

Q. The Anaconda vein, the great Anaconda, was located as a silver mine, wasn't it?

A. I don't know, it was located as a mine; I don't know what the ideas of the men who located it was.

Q. You said a minute ago there were no copper mines located in those mines in Butte?

A. I just said there were some worked.

Q. With the exception of that one?

A. I can't give any reason for it; it might be because they didn't have money or they didn't want to work them or it might be it didn't pay to work them; you must judge of that yourself.

Q. How long did you stay in that hole marked A?

A. I suppose I was down there 5 minutes.

Q. And how long did you stay in the hole marked C?

A. No, I am wrong; in A I was down half or three-quarters of an hour, maybe more; I was in hole C about 5 minutes.

Q. How does the vein, or the stuff you found in hole A, compare with the stuff you found in hole C?

A. It is not very similar.

Q. Not at all similar?

A. No, I can't say it is similar.

Q. You didn't find any of that green-stained stuff in hole C at all, did you? A. No, sir, not a bit.

Q. What is the dip of that vein that you say is exposed in hole A—what is the direction of the dip, and about what angle?

A. It dips to the south, and I should judge that it would dip about one foot in five in depth.

Q. That would be an angle of how much?

A. I don't know.

Q. Designate it with your hand.

A. Something about that way (indicating).

Q. Now that vein matter that you found in hole C, what was the dip there?

A. About the same; in the same direction.

Q. Did I understand you to say that the ledge matter in this hole C was about 3 to 4 feet wide?

A. I think it was about 3 feet wide.

Q. The country rock around there—if it is country rock and not a horse—is decomposed granite?

A. It is not a hard granite.

Q. It is badly decomposed granite?

A. No, not badly decomposed granite. It is granite that stood there after the hole caved in.

Q. Isn't decomposed granite, such as we have in that hole, not frequently stained from impregnations from minerals that may be in the crevices?

A. I have seen some granite stained, but, as a rule, the granite along the copper mines does not show much stain until after it is taken out awhile.

Q. That sample that you took out of hole C—how far down did you go to get it?

A. I believe I said at about 8 to 10 feet down; about 2 feet from the bottom.

Q. And you went down about 8 or 10 feet?

A. I went clear down, but I took it where it was handy to use my pick.

Q. And the samples you took out of hole A, you have mentioned the first one there as being taken from the place between the fourth and fifth sets of timber?

A. That is the second one.

Q. Where did you take the first one?

A. I told you I took the first one out of the open cut that lay right east.

Q. That is the little cut directly east of the discovery hole?

A. Part of the hole not taken in by the timber.

Q. Was that sample in place?

A. That was in place; I took it out of the mine.

Q. The second sample you took out of hole A, how deep was that?

A. That came from the west side of hole A and between the third and fourth set; I will see in a minute.

Q. How many feet would that be?

A. I estimate it to be 11 feet.

Q. From what? A. From the top of the shaft.

Q. That is from the collar of the shaft?

A. From the collar of the shaft.

Q. What is the collar of the shaft?

A. It is the top part of the timber.

Q. How deep down in the bed-rock would that be?

A. I estimated there was about one set of timbers above bed-rock; that would make it down about 5 or 6 feet below the bed-rock.

Q. That would be then about how many feet from the surface of the ground? ¶

A. I think it would be about 8 feet from the surface of the ground.

Q. The surface of the ground as it now is?

A. Yes.

Q. You don't know how deep that surface was in 1878?

A. I can only judge of the surroundings from what I saw of those cuts.

Q. You spoke about another sample you took there at 19 feet deep? A. Yes, on the west side.

Q. That was also on the west side?

A. Yes, right under.

Q. That 19 feet is from the collar of the shaft or the surface of the ground?

A. From the collar of the shaft.

Q. What kind of samples were they—were they average samples or picked samples?

A. Average samples. The one between the fifth and sixth set was 34 inches wide.

Q. And how deep was that? A. About 19 feet.

Q. That would be 19 feet?

A. Yes, the one I have marked third sample, the third sample.

Q. You said in addition to those samples, you took picked samples, about 19 feet deep from both sides of the shaft?

A. Yes, sir.

Q. You picked out the best you could see?

A. Yes, sir; as good as I thought there was there.

Q. Coming back to this mine that was worked for copper in the years you have spoken about—I think you called it the Parks Parrott; where is that location?

A. It is located between where the Ramsdell Parrott is now and the main Parrott works.

Q. Can you designate it by this location we have here of this “Childe Harold”? What direction and how far would it be from the “Childe Harold”?

A. It is about half a mile probably, due north almost from that.

Q. And is it in the flat or on the hill?

A. On the hill; on the side of the hill, up in that direction.

Q. What would you call that thing down there, a mine or a prospect, the “Childe Harold”?

A. An undeveloped mine.

Q. That is what we commonly call prospects?

A. I don't know; we have different names for such things.

Q. You know what a prospect is? A. Yes.

Q. You wouldn't call this a prospect?

A. No, I wouldn't call it a prospect; I would call a

prospect where I could find float without finding a mine; I would call this an undeveloped mine.

Redirect Examination.

By *Mr. Clark*. Q. When you locate a claim, do you have to locate it specifically as a copper claim or a silver claim or a gold claim?

The above question ruled out by the court.

Q. Do you know the Green Mountain and Calusa mines? A. Yes, sir.

Q. What do they produce? A. Copper.

Q. Do you remember whether or not they were being worked at all prior to 1880?

A. I think the Green Mountain had been worked considerably prior to that time.

Q. Where is the Green Mountain located?

A. It is located, you might say, due north of the Parrott and maybe a little east of north of the Parrott.

Q. Ever hear of the Shonebar and Black Chief claims?

A. Yes, I know them both; they are located further west than the "Childe Harold," and down further in the flat next to the creek.

Q. Do you know whether they are patented or not?

A. Both patented, I think.

Q. State whether or not from your knowledge there were a number of claims located on this flat and but a short distance to the west of the "Childe Harold" prior to 1880? A. Yes, there were several—lots of them.

Q. From this vein that you saw in the holes marked

A and C, from what you saw of it there, would you say that vein might not carry other minerals than copper?

A. No, it might carry silver and gold either with the copper.

Q. This Belmont mine Mr. McIntire asked you about, that is a developed mine? ;

A. I have never been through the development.

Q. It has been worked considerably?

A. Extensively worked, yes, it has been several times.

Q. I believe you said the Belmont mine had not been a success, although it had been worked considerably?

A. No, Mr. McIntire said that.

Recross-Examination.

By *Mr. McIntire.* Q. You say the Green Mountain was worked prior to 1880, was it worked prior to 1878?

A. I couldn't say about that.

Q. You are pretty certain it was worked prior to '80?

A. Yes.

Q. Where is the Green Mountain?

A. North of the Parrott about half a mile.

Q. On the hill too?

A. The Green Mountain as it was worked then was right in the gulch.

Q. But above this valley or flat?

A. A greater elevation, yes.

Q. What was it worked for?

A. Copper as far as I know; what we call a copper mine; I don't know what its value was.

Q. This Shonebar and Black Chief, these two claims you have spoken about are recent locations are they not?

A. No.

Q. How old are they?

A. They are old locations; the Black Chief is one of the oldest locations in the camp.

Q. You say there were lots of claims located to the west of the "Childe Harold" in 1880; what can you say about the year 1878?

A. Well, there were lots located prior to that year.

Ernst Sticht, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. Where do you reside?

A. Butte, Montana.

Q. And what is your occupation?

A. Assayer.

Q. How long have you lived in Butte?

A. About 6 years.

Q. How long have you been engaged in that business there? A. Six years.

Q. Do you know Mr. Forbis who has just testified?

A. Yes, sir.

Q. Do you know Mr. John Gillie who gave his evidence this morning? A. Yes, sir.

Q. Do you know Mr. Charles Colbert who has testified here? A. Yes, sir.

Q. State whether or not you ever received from either of these gentlemen or from them all samples for assays?

A. I have from all three.

Q. And when did they bring you these samples?

A. It was on April 27th.

Q. Of this year 1895? A. Yes, sir.

Q. Where did they leave these samples, at your place of business? A. Yes, sir.

Q. Where is that?

A. At 316 North Main street, Butte.

Q. How were those samples, in packages so they could be identified? A. In ore sacks, tied up.

Q. Were they numbered?

A. Yes, sir, they were numbered.

Q. Take first Mr. John Gillie—state whether or not you made an assay of the samples Mr. Gillie left with you on April 27th? A. I did.

Q. How many samples did he give you?

A. Five.

Q. State the result of that assay?

A. His first, number 7, was 1.9 ounces of silver and 2.9 per cent copper; number 8, $2\frac{1}{2}$ ounces of silver, 17.8 per cent copper; number 9, 1.4 ounces silver, 6.2 per cent copper; number 10, 2 ounces silver and .54 per cent copper; number 11, 1 ounce silver and 1.6 per cent copper.

Q. Those were the Gillie samples, all of them?

A. Yes, sir. Mr. Forbis' were numbered from 1 to 6.

Q. Mr. Forbis' samples were numbered from 1 to 6, numbers 1, 2, 3, 4, 5, and 6. Give the result of Mr. Forbis' samples?

A. Number 1, 3 ounces silver and 4 per cent copper; number 2, 1 ounce silver and 2.9 per cent copper; number 3, 2 ounces silver and 4.5 per cent copper; number 4, 2 1/2 ounces silver and 18.3 per cent copper; number 5, 2 ounces silver and 54 per cent copper; number 6, 5 1/2 ounces silver and 6.2 per cent copper. In Mr. Colbert's sample, there are 2 ounces silver and 19.7 per cent copper.

Q. He only brought you as I understand it one sample: Mr. Colbert brought you but one sample?

A. One sample.

Q. Where did you learn to make assays?

A. Golden, Colorado.

Q. At a school or from practical experience?

A. At a school, the State School of Mines.

Q. How long were you there?

A. Three years.

Q. You have, I presume, made a good many assays during your residence in Butte, from samples that were brought in to you? A. Yes, sir.

Q. State how the average of these samples you have just referred to compares with the average assays that were brought to you?

A. That is something I couldn't say.

Counsel for plaintiff objected to the above question and answer. Objection sustained.

Q. Have you assayed a good many samples that you know came from prospects—not developed mines but prospects?

A. I couldn't swear where they came from.

Q. You never made any inquiries as to whether they were from prospects or from developed mines?

A. No, sir.

Q. You used in making these assays the regular process?

A. The so-called cyanide process for the copper and the fire assay for silver.

Q. State whether or not in your judgment that is the most approved method of assaying?

A. It is a very rapid method and answers all practical purposes.

Q. And regarded as nearly correct as any other process?

A. Yes, sir.

No Cross-Examination.

Daniel Zenn, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark*. Q. Where do you live?

A. Butte City, Montana.

Q. How long have you lived there?

A. Since 1878.

Q. What has been your occupation during the period of your residence in Butte?

A. Prospecting, mining and milling.

Q. You came to Butte in 1878?

A. Yes, the spring of 1878.

Q. In that year did you know Mr. Charles Colbert?

A. Yes, sir.

Q. Did you in 1878 know of any such quartz location as the Morning Star? A. Yes, sir.

Q. Will you state the circumstances under which you gained your knowledge of the existence of such a claim?

A. I had a location west, a little west from there.

Q. What is the name of this location you had west of it. A. The Pay Streak.

Q. What was the date, as nearly as you can remember it, upon which you located the Pay Streak?

A. In April, 1878.

Q. Were you sole locator or did you have a partner?

A. I had a partner.

Q. What was his name? A. John McEwen.

Q. Did you discover from your work in locating the Pay Streak that there was such a claim as the Morning Star?

A. That was discovered before I discovered mine.

Q. When did you first have any knowledge of such a claim as the Morning Star, and how did you get at that knowledge?

A. I saw indications of the Pay Streak before I saw the Morning Star discovery, but I went to it afterwards.

Q. Did you run the boundaries and locate the corner stones of the Pay Streak?

A. I ran it up to the corners of the Morning Star.

Q. How far from the discovery upon the Pay Streak was it to these stakes on the Morning Star?

A. It was about 300 feet I should judge to the east line up to the corners of the Morning Star.

Q. Did you ever see the other corners of the Morning Star? A. No, sir.

Q. These two corners that you have spoken of are the west corners?

A. The west corners, the southwest and the northwest.

Q. Did you ever see Charles Colbert upon the Morning Star ground?

A. Yes, I saw him working there.

Q. When did you first see him at work there?

A. When I worked on my ground.

Q. About the time you were making the location of the Pay Streak? A. Yes.

Q. That was in April, 1878? A. Yes.

Q. Where did you see him at that time; where was he?

A. On his claim there; he was placer mining too at that time.

Q. Where was it you saw him with reference to any landmark you can remember around there?

A. I saw him on the discovery, what he calls his discovery.

Q. Did you have any conversation with him at that time? A. Yes, sir.

Q. What was it?

A. Just a common conversation—

Counsel for plaintiff objected to this hearsay evidence. Sustained.

Q. Did you at that time or at any other time in the year 1878 see Mr. Colbert at work there on the Morn-

ing Star claim, upon any excavation or any vein or anything of that kind?

A. No, sir, not that I remember.

Q. Did you ever see any excavation upon that Morning Star ground, any holes? A. On this claim?

Q. Yes.

A. I think I remember seeing a small hole there, but I never paid any particular attention to it.

Q. Did you look into it to see what was in it?

A. I just passed it.

Q. Do you remember whether you saw anything in it that would indicate a vein?

A. I couldn't say; I didn't pay any attention to it because—I went to the discovery where he was taking out green quartz.

Q. Who was taking out green quartz?

A. Charles Colbert.

Q. At that discovery, did you see a vein or anything to indicate the existence of a vein? A. Yes.

Q. Describe its dimensions as near as you can?

A. At that time there was a shaft there about 10 feet deep; he had a windlass on it; it looked like a good-sized ledge of green quartz.

Q. Do you remember how wide it was?

A. I think it was about three feet.

Q. You say the hole was about ten feet deep?

A. About ten feet I think at that time.

Q. And Colbert was working on it? A. Yes.

Q. Can you remember any more definitely than you have stated about the time of the year 1878 it was that you saw him there at work on this hole?

A. In April, I don't remember the date; about that time, the month of April; perhaps it was in May; I have been there several times.

Q. Do you know a quartz claim called the "Childe Harold"? A. Yes, just as it was pointed out.

Q. Have you been on the "Childe Harold" ground as it was pointed out to you? A. Yes, sir.

Q. Where is the "Childe Harold" ground, as pointed out to you, located, with reference to any landmark around there—take the railroad for instance?

A. This discovery shaft, the Colbert shaft -- the "Childe Harold" is east of that as pointed out to me.

Q. This is a map of the "Childe Harold" ground as made by Mr. Gillie; he has marked with blue marks the exterior boundaries of the "Childe Harold"; these marks indicate the shafts and holes there at the present time; you say you have been on the ground lately—can you point out upon that map the hole which in your judgment, or your best recollection, was the place you saw Mr. Colbert at work, and saw this green ore in 1878—first tell me, do you know a locality down there called the Parrot gulch?

A. I never knew it by the name Parrot gulch.

Q. This is the ravine known as the Parrot gulch; now just examine that again, and see if you can remember which hole it was, indicating on that map, where you first saw Mr. Colbert at work?

A. I think this is the point; I don't know of course if this is the west end or the east end. Is this the west end?

Q. That is east!

A. I couldn't tell by that map exactly.

Q. This bounded by the yellow lines is supposed to represent the exterior boundaries of the west half of the old Morning Star claim, as pointed out to the draughtsman by Mr. Colbert, its locator. That being the case, won't you point out to the Court above where your Pay Streak location was made with reference to this Morning Star?

A. It was west; it came up to the east end of the Morning Star; the east end of the Pay Streak came up to the west end of the Morning Star.

Q. Do you remember ever having seen any notice there at that hole where Colbert was at work in 1878?

A. Yes.

Q. Did you read it? A. Yes, sir.

Q. Do you remember what it was?

A. A discovery claiming— it described the claim, so many feet.

Q. Do you remember what he called it, what name was given to it? A. The Morning Star.

Q. Do you remember the dimensions which that notice gave as the dimensions of the claim?

A. I don't know exactly; I don't remember the exact size of it, but it was staked off like it was 5 or 600 feet wide.

Q. After that first visit that you made on the ground, did you ever see Mr. Colbert working there afterwards?

A. Yes, I saw him occasionally.

Q. Frequently? A. Several times.

Q. Do you remember whether you saw him on those other occasions in that same year or later?

A. Well, it was the same year I think he was there; I don't think I saw him after that. after 1878.

Q. Do you know Mr. Harvey McKinstry, or did you know him?

A. I don't think that I did; I wouldn't know him by name.

Q. Did you ever know Mr. Valentine Kropf?

A. No, sir.

Q. What would you say with reference to this vein that you say you saw in this hole in 1878, where Colbert was working—was it such a vein, in your judgment as a miner, as would warrant exploitation and exploration and the expenditure of time and money? A. Yes, sir.

Q. You say, in making your Pay Streak location, you encountered his stakes on the west end of the Morning Star? A. Yes, sir.

Q. And you knew that ground, the Morning Star, was located? A. Yes, sir.

Q. Would you have located that ground yourself where you saw Colbert working if it hadn't already been located? A. Yes, sir, I certainly should.

Q. Do you know whether or not the Pay Streak, your location, is patented now?

A. Yes, it is patented; it was patented anyway.

Q. Do you remember whether or not there has been any litigation with regard to the Pay Streak, any lawsuits in the courts over it?

A. Yes, there has been.

Q. Do you know what the question involved was? To which question counsel for plaintiff objects.

Objection sustained.

Cross-Examination.

By *Mr. McIntire*. Q. You think Mr. Colbert's showing down there would have justified a location?

A. Yes, sir.

Q. For what purpose, mining or town lots?

A. Mining.

Q. That was all placer ground around there in those days? A. Yes, placer ground.

Q. Pretty good placer ground, wasn't it?

A. They said it was paying; I don't know how it paid.

Q. Do you know of any paying quartz ever being taken out of that Morning Star?

A. I never knew of any ore being treated out of it.

Q. You know of gold being taken out of that placer though, don't you.

A. I never took any out myself.

Q. You say you saw Colbert working on this claim in the spring of 1878? A. Yes.

Q. What month? A. April.

Q. Who was working with him?

A. I don't know.

Q. Was he working all alone?

A. I think he was there alone when I saw him.

Q. He was working the windlass?

A. He had a windlass on the claim.

Q. Was he working the windlass at that time?

A. I don't know as anybody was working the windlass.

Q. Was he down in the hole?

A. He showed me his claim; I think he was.

Q. He was down in the hole while he was working?

A. I don't know whether he was in the hole or on top.

Q. How was he working—what was he doing there then?

A. I don't know how he was working; I see him there at the hole.

Q. You saw him there at the hole; you said you saw him working that claim—what was he doing?

A. They had a hole there, a shaft, about 10 feet.

Q. What was he doing at the time you saw him at that shaft? A. He was just talking.

Q. His working consisted of the conversation he had with you? A. He was there at the time.

Q. You and he were alone there then?

A. I couldn't tell who was there.

Q. Do you know of your own knowledge that he dug that hole in the spring of 1878?

A. I see him there, at times I could see him there.

Q. Did you see him digging that hole?

A. I saw him dig others.

Q. In April, 1878?

A. I didn't see him dig it all; I saw him dig there.

Q. You saw him digging there in the spring of 1878?

A. Yes, sir.

Q. Charley himself or somebody else?

A. I saw him working there.

Q. We were talking about Charley Colbert digging on this hole at the Morning Star; when did you ever see him digging there, actually working himself?

A. In 1878.

Q. In the spring of 1878? A. Yes.

Q. This was the time you referred to before?

A. Yes.

Q. He was working there at that time?

A. Yes.

Q. How many days did you see him working there?

A. I couldn't tell.

Q. Did you ever see at any time any person working with him? A. Yes, sir, a man.

Q. Do you know the name of that man?

A. No, sir.

Q. Do you know Mr. Bridenbutcher?

A. Yes, sir.

Q. You are a German?

A. I am a Pennsylvanian.

Q. How deep was that hole Charley showed you in the spring of 1878?

A. About 10 feet I should judge.

Q. Was there any soil around the hole?

A. Some surface ground, surface soil.

Q. Then this 10 feet would be 10 feet from the surface? A. Yes, sir.

Q. Was it timbered at that time? A. No, sir.

Q. What did the windlass set on?

A. He had a frame for it.

Q. Did you see him working there at that hole subsequent to the spring of 1878? A. No, sir.

Q. Were you living on the Pay Streak lode at that time? A. No, sir.

Q. Where did you live? A. In the city.

Q. Were you down on this ground at any time later on than the spring of 1878?

A. Along there occasionally in the summer.

Q. You have mentioned before that you located the lode called the Pay Streak lode? A. Yes, sir.

Q. What was that located for?

A. For gold and silver.

Q. How long did you own that Pay Streak lode?

A. I represented it for a couple of years.

Q. Then sold it to somebody?

A. I let my partner have it; he kept representing it for some time and then sold it.

Q. Did you do anything besides representation work?

A. No, sir.

Q. Has anything ever been done on that claim except representation work?

A. Not that I know of.

Q. That claim is covered also with houses?

A. Yes, there is some buildings on it.

Q. Pretty valuable for town lot purposes?

A. Yes, I should say so; I believe it is.

Redirect Examination.

By *Mr. Clark.* Q. Any houses on the Pay Streak lode in 1880? A. No, sir.

Q. Any houses on it when you located it?

A. Not at all.

Q. In locating the Pay Streak do you remember how you bounded it?

A. It was bounded on the east by this Colbert claim.

Q. What is the name of that claim?

A. The Morning Star.

Mr Clark. In connection with the evidence of Mr. Zenn, we present a certified copy of the original notice of location of the Pay Streak lode, which he has testified to having located in 1878; it speaks of the Pay Streak as being bounded by the Morning Star as a reference to a permanent object.

Counsel for plaintiff object to its introduction; the notice of location of the Morning Star being better evidence. Objection sustained. Exception taken.

Wesley P. Emery, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark.* Q. You live in Butte!

A. Yes, sir.

Q. Are you the same Wesley P. Emery who gave evidence in the form of a deposition in this action in Butte some time ago!

A. I gave evidence in the former case in a deposition in Butte.

Q. You heard the evidence of Mr. Gillie this morning in reference to this map!

A. A portion of it I heard.

Q. This blue outline represents the "Childe Harold" Mr. Gillie said this morning, this blue portion represented the exterior boundaries of the "Childe Harold"; this yellow the west end of the Morning Star as pointed out to him by Mr. Colbert and these marks here, the

letters, represent the various improvements in shafts, etc. This line represents the Parrot gulch. Now, will you point out upon that map as nearly as you can recollect, the points where you testified you saw Mr. Colbert at work or where you saw veins uncovered in holes there and saw Colbert at work on them in 1877 or '78; point out first what you should regard to be the first discovery shaft?

A. This shaft marked A is what I would suppose from the map to be the discovery hole in the little cut Mr. Colbert ran here to work out a little piece of ground for placer. It was discovered about 5 feet below the surface of the ground, that is below the soil, top of the soil and the other shaft I suppose to be shaft B is a shaft a little further west out on the bar, I should judge from about 90 to 100 feet is what I would put it at by a guess. Those are the only two holes I remember ever seeing Mr. Colbert at work in.

Q. And as nearly as you can remember when was it that first saw him at work on that second hole, hole further west?

A. As near as I can remember—I couldn't say for certain—but it seems to me that it was the fall following the location of the mine; that is my impression, although I wouldn't be positive; it may have been the next year, but it seems to me it was the fall following the location.

Q. Mr. Colbert says he made the location about July 2, 1877, and that would be in the fall of 1877?

A. Yes, sir.

Q. The first time you saw the second hole, about how deep was it do you think?

A. From 4 to 6 feet, something along there.

Q. State whether or not you saw anything which appeared to you to be a vein in that hole, the second one, the one furthest west?

A. Yes, there was an indication of vein in the hole, and in fact there is a vein there.

Q. About how wide was it when you saw it the first time?

A. Somewhere about 3 feet.

Q. Anything peculiar as to color?

A. Principally a sort of a brown color, but stained with green.

Q. You stated in your deposition, your evidence before, that you had experience in mining—state whether or not what you saw in that second hole the first occasion that you saw it would, in your opinion, justify a quartz location upon it?

Mr. McIntire. We object to that; that has been answered in the deposition. Objection sustained.

No Cross-Examination.

Benjamin Tibbey, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. Clark.* Q. Where do you live?

A. Butte City.

Q. How long have you lived there?

A. Since 1877.

Q. What is your occupation? A. Mining.

Q. How long has that been your occupation?

A. Ever since I was between 7 and 8 years old.

Q. Are you the Mr. Tibbey who testified formerly in Butte in this same case in deposition form?

A. Yes, sir.

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. Are you in the employ of any mining companies in Butte at the present time?

A. I am superintendent of the Parrott Silver and Copper Company since the 30th day of April, 1881. I am also the agent of the Davis estate, of mines owned by the Davis estate in Butte City.

Q. Who opened the Parrott mine?

A. I opened it myself.

Q. About what year?

A. The 30th day of May, 1881, when I started it.

Q. Where is the Parrott mine located with reference to the Anaconda mine proper?

A. It is about the corner of one of the Anaconda claims, is within 100 feet of the Parrott shaft house.

Q. Are you familiar with the development and history of the principal mines in Butte or a good many of them? A. Yes, sir.

Q. You say you opened the Parrott mine yourself?

A. Yes.

Q. Has it been in your charge ever since it was opened? A. Ever since, up to the present hour.

Q. Is the Parrott mine the principal mine of the Parrott Silver and Copper Co.? A. Yes.

Q. Do you know a claim called the "Childe Harold" in the city of Butte? A. Yes, sir.

Q. Whereabouts is it located with reference to the Montana Central depot?

A. It is located east of the Montana Central depot; in fact the Montana Central depot is on the ground on the northwest.

Q. Have you been on the ground recently?

A. Yes, sir.

Q. When were you last there? A. Yesterday.

Q. Did you at that time make an inspection or examination of these shafts or holes that have been testified to here, any of them? A. Yes.

Q. State which one!

A. I am acquainted with all those holes; this is the discovery shaft; that is the second discovery; they were on the ground when we bought the ground; the other work I done myself, except this one here which Mr. Ringeling has done in 1886.

Q. Take the holes which are marked upon that map A and C; have you at any time recently made a particular examination of those holes or shafts which are marked respectively A and C? A. Yes, sir.

Q. State whether or not you found anything in shaft A which would indicate to you as a mining man, the existence of a vein or lode?

A. There is a vein there, from 4 to 6 feet.

Q. From 4 to 6 feet? What dimension is that?

A. 4 to 6 feet wide; I couldn't say exactly to a foot of two.

Q. When you were last there and made an examination of it, was the lagging in the shaft removed?

A. Yes, sir.

Q. On how many sides?

A. On both sides; the lagging is cut out upon the west side on the second set below the surface; on the east side it is cut out on the third set below the surface and several places below that point.

Q. Did you make any examination of shaft marked C at that time? A. Yes, sir.

Q. Did you find anything in that hole which to you as a mining man indicated the existence of a vein or lode?

A. Yes, there is a vein there about 3 feet wide.

Q. Can you judge from what you saw of this vein in these two holes of its trend or direction?

A. It has a little slight dip to the south as all veins have in that district.

Q. And how about its trend or general direction?

A. I should judge it is about east and west, I couldn't say exactly; I didn't have a compass on it.

Q. Did you see in this hole marked "C" anything which appeared to you to be a wall?

A. Yes, sir, there is an indication of a wall there—of course, being so close to the surface, naturally the granite is more decomposed, more or less, but it is what I call a wall.

Q. In your judgment as a mining man, is there in this hole C, at the present time, such an indication of a

vein or lode as in your judgment would justify a location, or the expenditure of money upon it?

A. Yes, sir.

Q. What is the principal product of the Parrott mine?

A. Silver and copper.

Q. More silver than copper?

A. More copper than silver.

Q. The Parrott mine is a copper mine—is so generally regarded?

A. On the surface, on the first starting of the mine in base ore, we didn't have quite half an ounce of silver to a per cent of copper, that is a depth of 300 feet—at a depth of 600 feet we have an average of over an ounce of silver to a per cent of copper.

Q. State whether or not it is true that the majority of lodes or veins contain mineral in quantities that would pay to work the ore from the surface down?

A. I examined the Parrott for the company before I started to work, taking samples off the surface. We found there was no value to it at that point and until we got down to water, which is about 60 feet; no ore has been taken off the surface at all until we got to that point; that is the highest point that has been worked from below up; none from the surface down. The Mountain View was down 400 feet; at the 500 feet they struck the base ore.

Q. At the time you made the visit which you have just described to this ground and examined A and C, state whether or not you took any samples of this vein matter you saw there?

A. I took some samples of it, but I generally make a test as to copper right there on the ground.

Q. Did you take samples? A. Yes, sir.

Q. Have you those samples with you?

A. No, I have not.

Q. Have you them here in the courtroom where you can get them?

A. No, I have samples of the ore I have taken off the ground, but I haven't the assay samples.

Q. That is what I mean, samples of the ore that you have taken off the ground—tell the Court where you found those samples?

A. This sample is taken from the second set from the surface, on the west side; this sample here, which is an average of about 3 feet—

Q. Which hole is from—describe it more particularly? A. That is in the discovery shaft.

Q. This is A?

A. That is A; the other sample, the green ore is around the east side, about the third set from the top.

By *The Court*. Both in the same shaft?

A. Both in the same shaft, but on the opposite side.

Q. Describe briefly the character of that formation; what is that, quartz?

A. That is quartz; all the mineral of that is leached out by the action of water and air; in all copper formations at Butte this is the character of the ore, before you come to water, those pores or cells that you see in that ore are filled with pyrites of copper, etc. That is the character of the ore that is on top of that copper vein and if all the rock in the Anaconda and Parrott or any

of the other copper mines in Butte were put on that table, as far as the red oxide is concerned, you couldn't tell the difference, only this is a little greener and this carries a little more red oxide than in the Anaconda or Parrott.

Q. Is that matter, in your judgment as a mining man, vein matter?

A. Those are quartz; this is vein matter.

Q. Is it material which, in your judgment as a mining man, would carry mineral deposits?

A. Yes, carry mineral below water. The mineral has been leached out now—the cells or pores in that rock have been leached out by the action of water or air. Below water the cells are filled with pyrites of copper, sulphuret of copper, etc.

Q. Where did you take them?

A. From the east side, from the surface on the east side.

Q. What is the character of that formation?

A. That shows the characteristic of the different kinds of rocks, what we call green carbonate ore which is a splendid indication of copper. We never assayed that ore; I didn't bother about assaying it.

Q. In Butte when you gave your testimony formerly in this case, your testimony generally was to the effect that since 1885, when you and Mr. Overend and Mr. Ringeling received this deed of this property, of this claim, from the representative, Mr. McKinstry, you had done the representation work there upon this claim as required by law?

A. Yes, sir.

Q. I make this explanation for the benefit of the

Court as to his former testimony and in connection with his evidence taken under deposition as to the performance of the annual work, we offer in evidence the certified copies of the affidavits of the parties who performed the annual work upon the "Childe Harold" claim to the amount required by law for the years 1887, 1888, 1889, 1890, 1891, 1892, and for the years 1893 and '94, the certified copies of the intention to hold the claim, which are permissible to be filed in lieu of the performance of the annual work. Mr. Tibbey in his former testimony testified to the performance of the annual work in 1885, the first year they held it and in connection with the deposition of Mr. Ringeling, there was introduced in evidence, the original affidavit of one Thomas Overend to the effect that he had performed the required amount of annual work for the year 1886. I offer these in evidence for the reason that as I understand the ruling of the land office, the bringing of an adverse suit to an application for quartz patent does not suspend the necessity for the performance of annual work.

Q. I see that in two I think of these certified copies, the statement is made that the work was performed upon the "Childe Harold" claim at the request of Mr. Ben. Tibbey for the Parrott Silver & Copper Co., the claimant of the location; can you give any explanation of how that statement should have been incorporated in these affidavits?

A. I paid for those, but if I hire a man to do work, he thinks he is doing work for the Parrott Company, because I am superintendent of the company, and I didn't tell them that they were doing it for me personally.

Cross-Examination.

By *Mr. McIntire*. Q. Who is the real party in interest, yourself or the Parrott Smelting Co.?

By *Mr. Clark*. Just a moment. In connection with Mr. Tibbey's evidence, we offer the offer the original deed of the "Childe Harold" claim dated the 20th day of June, 1885, from Edward T. McKinstry to Benjamin Tibbey, A. F. Migeon and Nicholas B. Ringeling.

Mr. McIntire. We will examine these papers later.

Q. Was the Parrott Company after this land or yourself? A. Myself.

Q. Mr. Migeon is the president of the Parrott smelter?

A. No, I don't know whether he is a director or not; he is one of the company.

Q. One of the largest stockholders too, is he not?

A. Yes, sir.

Q. You say you have been mining since you were 7 or 8; do you mean quartz mining?

A. No, I say I have been mining since then.

Q. How long have you been been quartz mining?

A. Since 1877 in the State of Montana, but I quartz mined in Wales as a boy before I came to this country.

Q. Will you repeat to me when you first went to Butte? A. 1887.

Q. '77 or '87? A. '77.

Q. That is the year you went there—you are certain it is '77 instead of '87? A. I mean 1877.

Q. You are certain that is the time you went to Butte? A. Yes, sir.

Q. That is the time you began quartz mining in Montana? A. Yes, sir.

Q. Your first experience then as a quartz miner was in Butte—in Montana, at least?

A. Yes, in Montana—yes, sir.

Q. You say this green carbonate of copper is a splendid indication of copper—is it anything more than an indication? A. Yes, sir.

Q. What do you mean then by the word indication?

A. It is a splendid indication because it is not base; it is what we call carbonate of copper.

Q. What do you mean by the word indication?

A. It is a splendid indication of being below.

Q. In other words, if you go further below you might run into copper?

A. Yes, base ore; this is sulphide ores—these are sulphide ores.

Q. If you run down, then, you might run into sulphides of copper? A. Yes, sir.

Q. You have no idea how far you would have to run down?

A. I don't believe I would have to run far below water, very little below water, if any.

Q. In the Parrott you say you went down 300 feet?

A. Went down 60 feet below the surface.

Q. And that is where you found the shipping ore in the Parrott? A. Yes.

Q. Ever find any shipping ore in "Childe Harold"?

A. Never shipped any.

Q. Ever go down there? A. Yes, sir.

Q. Ever do any pumping there? A. No, sir.

Q. Ever work below the water line?

A. No, sir.

Q. Is that a permanent line, the water line, in the wet season?

A. I never knew it but what the water was at that point.

Q. Is that the permanent line of water?

A. Yes, sir.

Q. This green stuff here you found on the east side of the shaft?

A. Yes, sir.

Q. And the other the west half?

A. Yes, some little green on the west also.

Q. Why is it they don't have the same appearance on both sides of the shaft?

A. One is more quartz than the other, and not so much stained.

Q. This stuff on this paper, is that the same as that?

A. Pretty near the same, but this is in the centre; it is in the creek where it was cut across the vein; this is what was cut across the other side.

Q. You testified to that hole marked C; did you go down in there?

A. Yes.

Q. And compared with this hole A, what is the character of the stuff you find there?

A. There is a little green stain in the bottom, and there is a red oxide of iron there.

Q. Do you find any such stuff as that in C?

A. Yes, sir.

Q. How deep down, how far?

A. I should judge that hole is about 12 feet?

Q. Where did you find the stuff like this in hole C?

A. It starts in from about 14 or 15 inches from the surface to the bottom.

Q. Did you bring any of that in?

A. No, sir, I thought this was sufficient.

Q. Just a short distance to the east of what you call hole A is another shaft, a timbered shaft?

A. Yes, just over the line; it is right here.

Q. Take this other map—a short distance to the east; have you ever been in that hole?

A. No, sir, never.

Q. Made any investigation of that hole at all?

A. No, sir, I did not.

Q. Don't know how deep it is either, do you?

A. No sir, I do not.

Q. You say in your opinion that indication that you find down there would justify the expenditure of money for exploiting in this location; that is under the present state of affairs, is it not? You mean that you think under the existing condition of affairs, it would be justifiable to expend money in further exploiting or developing this location? A. Yes, sir.

Q. Have you ever done very much exploiting in the "Childe Harold"?

A. We never went below water but very little distance.

Q. Did you ever pretend to do anything except annual work? A. Not as yet.

Q. A great deal of this work that is now on the "Childe Harold" was done in the last few months, since we started in on this lawsuit?

A. There has been \$100 done each and every year since 1885.

Q. (Last question repeated.)

A. No, sir, we took and opened two holes there, right in there; those two there; this one here and that one there has been opened this year, just to open the vein so you could see it when you came around.

Q. That has been done in the last month or two?

A. Yes.

Q. That was done for our accommodation?

A. Just to prove up the vein.

Q. And you think \$100 work, worth of work, has been done on that claim each year?

A. Yes; paid for it anyhow.

Q. You paid that much for it? A. Yes.

Q. Do you think that the various improvements on that "Childe Harold" will amount to 7 or \$800?

A. Yes.

Q. In 1887 you started in to do your annual work? What in your opinion as a mining man is the value, not what you paid for it, but the value of the various improvements now in existence on the "Childe Harold" location; not what you paid for it; what is the value in your opinion?

A. I couldn't say what the value would be; of course if you come to work it you would have to sink a much larger shaft.

Redirect Examination.

By *Mr. Clark*. Q. This surface down there is an alluvial surface, sandy, gravel? A. Yes.

Q. Isn't some of that sand washed into this place,

where the annual work has been done from time to time—covered them up partially? A. Yes.

Q. You say that during the time you had it all the money you expended on it practically has been the performance of the annual work? A. Yes.

Q. There has been a lawsuit on this property since 1887? A. Yes, sir.

Q. And you didn't know whether you owned it or not since 1887?

A. No, sir, I don't know whether I own it yet or not—thought I did when I bought it.

Q. Something has been said here with regard to the buildings that are upon this ground to the west of those two shafts or holes that you have described—are there any buildings?

A. On the "Childe Harold" ground?

Q. Yes.

A. West the only thing that is there is the Montana Central depot and also the Pipe & Tile Works, and there are some houses—some little shacks over there on the west side, on the west end.

Q. What is the value of the surface ground there?

A. The value don't amount to much. I wouldn't give \$500 for all of it; I don't want the surface ground, I want the vein—I wouldn't give \$500 for it.

Recross-Examination.

By *Mr. McIntire*. Q. You haven't put up any buildings around there? A. No, sir.

Q. All those buildings were put up by persons claiming under the placer patent?

A. I don't know.

Q. And you think that the 15 acres of ground we are now litigating about is not worth \$500?

A. No, sir, I don't think it is for the surface ground; it is the only vein I care about.

Mr. Clark. We offer in connection with Mr. Tibbey's testimony, these samples that he has brought here. We also offer in evidence the certified copy of the placer patent, mineral certificate number 511 issued by the United States.

Mineral certificate number 511 admitted in evidence and marked Exhibit 2.

Mining deed from E. T. McKinstry to Benjamin Tibbey et al. also admitted and marked number 3.

Affidavits of representation work also admitted and marked as follows:

For 1887,	Exhibit Number 4	
For 1888,	„	5
For 1889,	„	6
For 1890,	„	7 (Affidavit of James H Smith)
For 1890,	„	8 (Affidavit of Thomas Mitchell)
For 1891,	„	9
For 1892,	„	10 (Affidavit of John H Jones)
For 1892,	„	11 (Affidavit of Edwin Giles)
For 1893,	„	12 (Non-forfeiture)
For 1894,	„	13 („ No. 2, 03)
For 1894,	„	14 („ No. 2,914)

DEFENDANTS' EXHIBIT NO. 2.

*District Court, Third Judicial District, County of Deer
Lodge, State of Montana.*

(4-459)

GENERAL LAND OFFICE, No. 4124.

Mineral Certificate No. 511.

The United States of America, to all to whom these presents shall come, greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there has been deposited in the General Land Office of the United States the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that in pursuance of the said Revised Statutes of the United States, John Noyes did, on the fourteenth day of July, A. D., 1879, enter and pay for certain placer mining premises, being mineral entry number five hundred and eleven (511) in the series of said office, embracing fractional lot number four (4), of section eighteen (18), fractional lot number one (1), of section nineteen (19) in Township three (3) north, of Range seven (7) west, the southeast quarter of the southeast quarter of section thirteen (13), the north half of the northeast quarter of the northeast quarter of section twenty-four (24), in Township three (3) north, of Range eight (8) west, of the principal meridian, containing one hundred and thirty-four (134) acres and twenty hundredths

(20-100) of an acre of land, more or less, as shown by the official survey and plat of said township, said placer mining claim, or lot of land being situated in the Summit Valley mining district, in the County of Deer Lodge, and Territory of Montana, in the district of lands subject to sale at Helena.

Now know ye, that the United States of America, in consideration of the premises and in conformity with said Revised Statutes of the United States has given and granted, and by these presents do give and grant unto the said John Noyes and to his heirs and assigns the said placer mining premises above described as fractional lot numbered four (4) of section eighteen (18), fractional lot numbered one (1) of section nineteen (19), in Township three (3) north, of Range seven (7) west, the southeast quarter of the southeast quarter of section thirteen (13), the north half of the northeast quarter of the northeast quarter of section twenty-four (24), in Township three (3) north, of Range eight (8) west, of the principal meridian. To have and to hold said mining premises together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said John Noyes, and to his heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations.

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said legal subdivisions, as hereinbefore described, and to any veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits and

which are not claimed or known to exist at the date hereof.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits for the purpose of extracting and removing the ore from such vein, lode or deposit should the same, or any part thereof be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fourth. The premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs and decisions of courts.

Fifth. That the absence of necessary legislation by congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to the complete development thereof.

IN TESTIMONY WHEREOF, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-eighth day of July in the year of our Lord, one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

By the President,

R. B. HAYES,

[SEAL OF THE GENERAL LAND OFFICE.]

By WM. H. CROOK, Secretary.

S. W. CLARK,

Recorder of the General Land Office.

Recorded Vol. 51, pages 370 to 373, inclusive.

Examined.

Filed for record Aug. 25th A. D. 1880 at 8 o'clock

A. M.

J. E. DICKEY,

County Recorder.

STATE OF MONTANA, }
County of Deer Lodge. } ss.

I, J. F. Brazelton, Clerk and Recorder in and for said county do hereby certify the foregoing to be a full, true and correct copy of United States patent to John Noyes, as the same appears of record in book S, page 284 records of Deer Lodge county, Montana.

Witness my hand and official seal this 26th day of December, A. D. 1894.

[SEAL]

J. F. BRAZELTON,

County Clerk and Recorder.

[Endorsed]: No. 180. Exhibit No. 2, Defts. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 3.

This Indenture, made the 20th day of June, in the year of our Lord, one thousand eight hundred and eighty-five, between Edward F. McKinstry, of Butte, Silver Bow county, Montana Territory, party of the first part, and Benjamin Tibbey, Achille F. Migeon, and Nicholas B. Ringeling, of the same place, parties of the second part witnesseth:

That the said party of the first part, for and in consideration of the sum of seventy-five dollars lawful money of the United States of America, to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed and quit-claimed, and by these presents does grant, bargain, sell, remise, release, convey, and quitclaim unto the said parties of the second part and to their heir and assigns forever, all the right, title and interest, estate, claim and demands, of the said party of the first part, of, in and to that certain portion, claim and mining right, title and property on "Childe Harold" certain ledge, vein, lode or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in the Summit Valley mining district, County of Silver Bow and Territory of Montana, and described as follows, to-wit:

Beginning at the S. W. corner of a granite stone 15 sec. by 12 sec. by 8 sec. marked M. C. $\frac{1}{346}$ for corner No. 1 from which the corner to sections 13, 18, 19 and 24 in T. 3 N., R. 7 and 8 W. bears S. 21 deg. 08 E. 250 feet

distant, and running thence N. 79 deg. E. 1500 feet, thence 23 deg. W. 600 feet, thence S. 79 deg. 45 min. W. 1500 feet, thence S. 23 deg. E. 600 feet to the place of beginning, containing an area total 20.15 acres claimed by above-named party.

The adjoining claims are M. E. No. 511 on the north, west and south and M. E. No. 570 on the east.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver, and metal-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident appendant and appurtenant, or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold, all and singular, the premises, with the appurtenances and privileges thereunto incident, unto the said parties of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

EDWARD T. MCKINSTRY. [SEAL]

Signed, sealed and delivered in the presence of

TERRITORY OF MONTANA,)
County of Silver Bow.) ss.

On this 20th day of June, A. D. 1885, before me, James W. Forbis, a notary public in and for the Territory of Montana, personally appeared Edward McKinstry, to me personally known to be the person described in and who executed the foregoing instrument,

and who severally acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed my notarial seal on the day and year in this certificate first above written.

[SEAL]

JAMES W. FORBIS,
Notary Public.

No. 3. Mining Deed. E. T. McKinstry to Benj. Tibbey et als. Dated _____, 188 . Filed for record June 20, 1885, at 10 o'clock A. M.

H. S. CLARK, County Recorder.
By _____, Deputy.

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

I hereby certify that the within instrument was filed in my office on the 20th day of June, A. D. 1885, at 10 o'clock A. M., and recorded on page 436 of book "G" of Deeds, records of Silver Bow county, Montana Territory.

Attest my hand and seal.

H. S. CLARK, County Recorder.
By _____, Deputy.

Fees \$3.50 paid.

[Endorsed]: No. 180. Exhibit No. 3 Defendants.
Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 4.

**Affidavit of Annual Labor Performed or Improvements Made
on "Childe Harold" Lode Mining Claim.**

TERRITORY of MONTANA, }
County of Silver Bow. } ss.

Joseph Gerard, Hirem Yates, of lawful age, being duly sworn say that they are residents of said county and Territory; that in the year 1887, between the 9th day of December and the 24th day of December, to-wit, on the 24th day in said year, at said County of Silver Bow, they did and performed 29 days labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in the Summit Valley mining district, Silver Bow county, Montana Territory; that said labor and work consisted of and was done in running a cut and sinking on said mining claim, and the character of said improvements was—and the reasonable value of said work and labor done was 100.00 dollars, and the reasonable value of said improvements made was 100.60 dollars; that said work and labor was done and said improvements made at the instance and request of N. B. Ringeling et al, who claimed to be the owners of said mining claim, and that the actual amount paid for said labor and improvements was 100.00 dollars, and said amount was paid by N. B. Ringeling to affiants for said work, and labor and improvements.

JOSEPH GERARD,
HIREM YATES.

Subscribed and sworn to before me this 29th day of December, A. D. 1887.

CALEB E. IRVINE,
Notary Public.

Filed for record Dec. 29th, A. D. 1887 at 35 minutes past 10 o'clock A. M.

C. F. BOOTH, County Recorder.
By Will L. Clark, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 136 in book A of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed the 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder,
By A. E. Whipps, Deputy.

[Endorsed]: April 30th, 1895. Geo. W. Sproule,
Clerk.

DEFENDANTS' EXHIBIT No. 5.

**Affidavit of Annual Labor Performed or Improvements
Made on the "Childe Harold" Lode Mining Claim.**

TERRITORY OF MONTANA, }
County of Silver Bow. } ss.

William Bowen, S. B. LeDernier and Alex. B. Ringe-

ling, of lawful age, being duly sworn say that they are residents of said county and territory; that in the year 1888, between the 1st day of March and the 31st day of December, to wit. on the 29th day of December in said year at said County of Silver Bow, they did and performed 29 days' labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Summit Valley mining district, Silver Bow county, Montana Territory; that said labor and work consisted of and was done in a cut 8 feet deep by 13 x 3 feet with tunnels at each end 12 x 5 x 2 feet and a shaft 4 x 4 x 8 feet long and a shaft 5 x 7 x 6 feet deep on said mining claim, and the character of said improvements was and the reasonable value of said work and labor done was \$106 dollars, and the reasonable value of said improvements made was dollars; that said work and labor was done and said improvements made at the instance and request of Nicholas B. Ringeling and Benjamin Tibbey who claimed to be the owners of said mining claim, and that the actual amount paid for said labor and improvements was \$100 dollars, and said amount was paid by them to affiants for said work, and labor and improvements.

WM. BOWEN,
S. B. LEDERNIER,
ALEX. B. RINGELING.

Subscribed and sworn to before me this second day of January, A. D. 1889.

[NOTARIAL SEAL.]

GREEN MAJORS,
Notary Public.

Filed for record January 3rd, 1889, at 2 o'clock, p. m.
 C. F. BOOTH, County Recorder.
 By J. F. Wilkins, Deputy.

STATE OF MONTANA, }
 County of Silver Bow. } ss.

I, C. Q. JOHNSON, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 237 book A of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 23d day of April, 1895.

[SEAL.]

C. Q. JOHNSON,

County Clerk and Recorder.

By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th. 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 6.

Affidavit of Annual Labor Performed or Improvements Made on "Childe Harold" Lode Mining Claim.

STATE OF MONTANA, }
 County of Silver Bow. } ss.

Levi Prentis and Charles Steer, of lawful age, being duly sworn, say that they are residents of said county and State; that in the year 1889, between the 11th day of November and the 24th day of November—to-wit, on

the 11th to 24th days of November inclusive—in said year at said County of Silver Bow, they did and performed fourteen days' labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Independence mining district, Silver Bow county, Montana; that said work and labor consisted of and was done in sinking a shaft six feet and drifting fifteen feet, sinking a shaft seven feet and drifting on ledge ten feet, cleaning main shaft and sinking three feet on said mining claim, and the character of said improvements was the development of said mine, and the reasonable value of said work and labor done was \$100.00 dollars, and the reasonable value of said improvements made was \$100.00 dollars; that said work and labor was done and said improvements made at the instance and request of Benjamin Tibbey, who claimed to be one of the owners of said mining claim, and that the actual amount paid for said labor and improvements was \$100.00 dollars, and said amount was paid by Ben. Tibbey to affiants for said work, and labor and improvements.

CHARLES STEER,
LEVI PRENTIS.

Subscribed and sworn to before me this 27th day of November, A. D. 1889.

[NOTARIAL SEAL]

CALRB E. IRVINE,
Notary Public.

Filed for record November 27th, 1889, at 20 minutes past 3 o'clock P. M.

C. F. BOOTH,
County Recorder.

STATE OF MONTANA, }
 County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 295 in book A of Aul. Rep. records of Silver Bow county, Montana.

Attest my hand and seal of said Silver Bow county hereunto affixed this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON, County Recorder,
 By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 7.

**Affidavit of Annual Labor Performed or Improvements Made
 on "Childe Harold" Lode Mining Claim.**

STATE OF MONTANA, }
 County of Silver Bow. } ss.

James H. Smith, of lawful age, being duly sworn, says that he is a resident of said county and State; that in the year 1890, between the 5th day of November and the 20th day of November, to-wit, on the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th days of November in said year at said County of Silver Bow he did and performed fifteen days labor and work and made improvements in and upon the "Childe

Harold' lode mining claim, situated in Summit Valley mining district, Silver Bow county, State of Montana; that said labor and work consisted of and was done in sinking a shaft to a depth of ten feet and timbering the same on said mining claim and the character of said improvements was sinking a shaft and timbering same and the reasonable value of said work and labor done by me was \$50 dollars and the reasonable value of improvements made was \$100 dollars, that said work and labor was done and said improvements made at the instance and request of Parrott Silver and Copper Mining Company who claimed to be the owner of said mining claim and that the actual amount paid for said labor and improvements was fifty-two 50-100 dollars to me, and said amount was paid by said company to affiant for said work (his part of said) and labor and improvements.

JAMES H. SMITH.

Subscribed and sworn to before me this 4th day of December, A. D., 1890.

G. W. STAPLETON,

Notary Public in and for Silver Bow County, State of Montana.

Filed for record December 5th, A. D. 1890, at 34 minutes past 2 o'clock P. M.

C. F. BOOTH, County Recorder.

By T. E. Booth, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county do hereby certify that the annexed instrument is

a full, true, and correct copy of the original instrument as recorded at page 496 in book A of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,

County Clerk and Recorder.

By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 8.

Affidavit of Annual Labor Performed or Improvements Made on "Childe Harold" Lode Mining Claim.

STATE OF MONTANA, }
County of Silver Bow. } ss.

Thomas Mitchell, of lawful age, being duly sworn, says that he is a resident of said county and State; that in the year 1890, between the 5th day of November and the 20th day of November, to-wit, on the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th days of November, in said year at said County of Silver Bow, he did and performed 15 days' labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Summit Valley mining district, Silver Bow county, State of Montana; that said labor and work consisted of and was done in sinking a shaft to a depth of 10 feet and timber-

ing the same on said mining claim, and the character of said improvements was sinking a shaft and timbering same, and the reasonable value of said work and labor done by me was fifty dollars, and the reasonable value of said improvements made was one hundred dollars; that said work and labor was done and said improvements made at the instance and request of Parrott Silver and Copper Mining Company, who claimed to be the owner of said mining claim, and that the actual amount paid for said labor and improvements was fifty two 50-100 dollars to me, and said amount was paid by said company to affiant for said work, and labor, and improvements.

THOMAS MITCHELL.

Subscribed and sworn to before me this 4th day of December, A. D. 1890.

G. W. STAPLETON.

Notary Public in and for Silver Bow county, State of Montana.

Filed for record Dec. 5th, A. D. 1890, at 35 minutes past 2 o'clock, P. M.

[SEAL]

C. F. BOOTH, County Recorder,
By T. E. Booth, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 497 in book A of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed the 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder,
By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 9.

**Affidavit of Annual Labor Performed or Improvements
Made on "Childe Harold" Lode Mining Claim.**

STATE OF MONTANA, }
County of Silver Bow. } ss.

John Nankervis and Charles Allen, of lawful age, being duly sworn, say that they are residents of said county and State; that in the year 1891, between the 7th day of November and the 19th day of November, to wit, on the — day of ——— in said year, at Silver Bow county, they did and performed 11 days labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Summit Valley mining district, Silver Bow county, Montana Territory; that said labor and work consisted of and was done in sinking shaft 6 x 7 x 17 feet and timbering ten feet of same on said mining claim, and the character of said improvements was sinking and timbering, and the reasonable value of said work and labor done was (\$77.00) dollars, and the reasonable value of said improvements

made was (\$23.00) dollars; that said work and labor was done and said improvements made at the instance and request of Jared E. Gaylord, attorney in fact for the Parrott Silver and Copper Company, who claimed to be the owner of said mining claim, and that the actual amount paid for said labor and improvements was (\$100.00) dollars, and said amount was paid by claimant to affiants for said work, and labor, and improvements.

JOHN NANKERVIS.

CHARLES ALLEN.

Subscribed and sworn to before me this 14th day of December, A. D. 1891.

[NOTARIAL SEAL]

C. P. DRENNAN,

Notary Public.

Filed for record December 14th, A. D. 1891, at 7 minutes past 2 o'clock P. M.

C. F. BOOTH, County Recorder,

By T. E. Booth, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 5 in book B of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 23d day of April, 1895.

C. Q. JOHNSON,

County Clerk and Recorder.

By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. George W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 10.

Affidavit of Annual Labor Performed or Improvements Made on "Childe Harold" Lode Mining Claim.

STATE OF MONTANA, }
County of Silver Bow. } ss.

John H. Jones, of lawful age, being duly sworn, says that he is a resident of said county and State; that in the year 1892, between the 24th day of May and the 10th day of June, to-wit, A. D. 1892, at said County of Silver Bow, he did and performed 15 days labor and work, and made improvements in and upon the said "Childe Harold" lode mining claim, situated in Summit Valley mining district, Silver Bow county, State of Montana; that said labor and work consisted of and was done in sinking a shaft and running a drift upon said claim, said—being sunk to a depth of $30\frac{1}{2}$ feet and drift run 7 feet on said mining claim and the character of said improvements was sinking and drifting and the reasonable value of said work and labor done was fifty-two dollars, and the reasonable value of said improvements made was \$106.15 dollars; that said work and labor was done and said improvements made at the instance and request of B. Tibbey for the Parrott Silver and Copper Company, who claimed to be the owner of said mining claim, and that the actual amount paid for said labor and improvements was to me \$52, (fifty-two dollars) and

said amount was paid by said company to affiant for said work, and labor and improvements.

JOHN H. JONES.

Subscribed and sworn to before me this 10th day of June, A. D. 1892.

[NOTARIAL SEAL]

G. W. STAPLETON,
Notary Public.

Filed for record June 25th, A. D. 1892, at 22 minutes past 12 o'clock P. M.

C. F. BOOTH, County Recorder.

By T. E. Booth, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 159 in book B of Aul. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder.
By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 11.

Affidavit of Annual Labor Performed or Improvements
Made on "Childe Harold" Lode Mining Claim.

STATE OF MONTANA, }
County of Silver Bow. } ss.

Edwin Giles, of lawful age, being duly sworn, says that he is a resident of said county and State; that in the year 1892, between the 24th day of May and the 10th day of June, A. D. 1892, in said year, at said County of Silver Bow, he did and performed $14\frac{1}{2}$ days' labor and work, and made improvements in and upon the said "Childe Harold" lode mining claim situated in Summit Valley mining district, Silver Bow county, State of Montana; that said labor and work consisted of and was done in sinking a shaft to a depth of $30\frac{1}{2}$ feet and running a drift therefrom a distance of 7 feet on said mining claim, and the character of said improvements was sinking and drifting and the reasonable value of said work and labor done was fifty 75-100 dollars, and the reasonable value of said improvements made was \$106.15, the fuse and powder used being worth \$3.45; that said work and labor was done and said improvements made and said material used at the instance and request of Ben. Tibbey for the Parrott Silver and Copper Company, who claimed to be the owner of said mining claim, and that the actual amount paid for said labor and improvements was fifty 75-100 dollars, to me, and the sum of \$3.40 for powder

and fuse and said amount was paid by said company to affiant for said work and labor and improvements.

EDWIN GILES.

Subscribed and sworn to before me this 10th day of June, A. D. 1892.

[NOTARIAL SEAL]

G. W. STAPLETON,

Notary Public.

Filed for record June 25th, A. D. 1892. at 20 minutes past 12 o'clock, P. M.

C. F. BOOTH, County Recorder,

By T. E. Booth, Deputy.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument as recorded at page 160 in book B of Annual Rep., records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county, hereunto affixed this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,

County Clerk and Recorder,

By A. E. Whipps, Deputy.

[Endorsed]: Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT No. 12.

Affidavit of Annual Labor Performed or Improvements Made
on "Childe Harold" Lode Mining Claim.

STATE OF MONTANA, }
County of Silver Bow. } ss.

Thos. Waters and C. G. Palmer, of lawful age, being duly sworn, say that they are residents of said county and State; that in the year 1893, between the 10th day of August and the 31st day of August, to-wit, on the _____ day of _____ in the said year, at said County of Silver Bow, they did and performed 28 days' labor and work, and made improvements in and upon the "Childe Harold" lode mining claim, situated in Summit Valley mining district, Silver Bow county, State of Montana; that said labor and work consisted of, and was done in a drift and cross-cut in said mining claim, and the character of said improvements was permanent and reasonable value of said work and labor done was one hundred and eight dollars, and the reasonable value of said improvements made was 108 dollars; that said work and labor was done and said improvements made at the instance and request of Benj. Tibbey and others who claimed to be the owners of said mining claim, and that the actual amount paid for said labor and improvements was 108 dollars, and said amount was paid by said Tibbey to affiants for said work, and labor and improvements.

CHAS. G. PALMER.

THOS. WATERS.

Subscribed and sworn to before me, this 18th day of September, A. D. 1893.

[NOTARIAL SEAL]

GEO. W. STAPLETON,
Notary Public.

STATE OF MONTANA,)
County of Silver Bow.) ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 421 in book B of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 15th day of January, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder,
By Geo. Grummell, Deputy.

[Endorsed]:

State of Montana, County of Silver Bow—ss. I hereby certify that the within instrument was filed in my office on the 20th day of September, A. D. 1893, at 12 min. past 1 o'clock P. M., and recorded on page 421 of book B of Affidavits of Representation, records of Silver Bow county, Montana.

Attest my hand and seal.

[SEAL]

C. Q. JOHNSON, County Recorder.
By A. E. Whipps, Deputy.

Filed April 30, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT NO. 13.

Notice in Lieu of Assessment Work.

STATE OF MONTANA, }
 County of Silver Bow. } ss.

To whom it may concern: I, the undersigned, for myself and in behalf of A. F. Migeon and N. B. Ringeling, the other owners of the following property, in order to secure the benefits of the Act of Congress entitled "An Act to amend Section 2324 of the Revised Statutes of the United States, approved July 18, 1894," relating to mining claims, hereby give notice that I and they intend in good faith to hold and work the following described mining claim, the "Childe Harold" quartz lode claim, located January 1, 1882, by Harvey W. McKinstry, situated in Summit Valley mining district, Silver Bow county, State of Montana, which said claim has been regularly located and recorded as required by the laws of the State of Montana and in compliance with the mining acts of congress, approved May 10th, 1872, and all subsequent acts, and with local customs, laws, and regulations, and the location notice of which is recorded in the office of the County Clerk and Recorder of Silver Bow county, State of Montana, in book A of Lode Locations at page 728, records of said Silver Bow county, to which record reference is hereby made for more complete description.

BENJAMIN TIBBEY.

[SEAL]

Subscribed and sworn to before me, a notary public, in and for Silver Bow county, this 21st day of November, 1894.

[NOTARIAL SEAL]

FRED. M. FERRELL,
Notary Public.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 388, in book C of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed, this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder.
By A. E. Whipps, Deputy.

[Endorsed]: No. 2503. Certified Copy. Notice in Lieu of Assessment Work, made on the "Childe Harold" quartz lode mining claim for the year 1894. State of Montana, County of Silver Bow, ss. I hereby certify that the within instrument was filed in my office on the 21st day of November, A. D. 1894 at 35 minutes past 11 o'clock A. M., and recorded on page 388 of book C of Annual Rep. records of said county, Montana. Attest my hand and seal: C. Q. Johnson, County Recorder. By A. E. Whipps, Deputy. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

DEFENDANTS' EXHIBIT No. 14.

Notice in Lieu of Assessment Work.

STATE OF MONTANA,)
 County of Silver Bow.) ss.

To whom it may concern: I, the undersigned, for myself and in behalf of _____ the other owners of the following property—in order to secure the benefits of the Act of Congress, entitled “An Act to amend Section 2324 of the Revised Statutes of the United States, approved July 18, 1894,” relating to mining claims, hereby give notice that I intend in good faith to hold and work the following described mining claims; the “Childe Harold” lode, recorded book A, page 728; the Parnell corner lode, recorded book F, page 279; the Strip lode, recorded book G, page 145, and the Maggie lode, adjoining the Shonebar lode on the east, situated in Summit Valley mining district, Silver Bow county, State of Montana, which said claims have been regularly located and recorded as required by the laws of the State of Montana and in compliance with the mining acts of congress, approved May 10th, 1872, and all subsequent acts, and with local customs, laws and regulations, and the location notices of which are recorded in the office of the County Clerk and Recorder of Silver Bow and Deer Lodge counties, State of Montana, in book A-F-G, at page 728-279-145, of the records of said Silver Bow county, to which record reference is hereby made for more complete description.

N. B. RINGELING. [SEAL]

Subscribed and sworn to before me, this 26th day of December, A. D. 1894.

[NOTARIAL SEAL]

A. E. WHIPPS,
Notary Public.

STATE OF MONTANA, }
County of Silver Bow. } ss.

I, C. Q. Johnson County Clerk and Recorder of said county, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument, as recorded at page 220, in book D of Anl. Rep. records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed, this 23d day of April, 1895.

C. Q. JOHNSON,
County Clerk and Recorder.
By A. F. Whipps, Deputy.

[Endorsed]: No. 2914. Certified Copy. Notice in Lieu of Assessment Work made on the "Childe Harold" et al. lode mining claim for the year 1894. State of Montana, County of Silver Bow, ss. I hereby certify that the within instrument was filed in my office on the 26th day of December, A. D. 1894, at 20 min. past 4 o'clock P. M., and recorded on page 220 of book D of Annual Rep. records of said county, Montana. Attest my hand and seal: C. Q. Johnson, County Recorder. By A. E. Whipps, Deputy. Filed April 30th, 1895. Geo. W. Sproule, Clerk.

[Endorsed]: No. 180. In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Montana Central Ry. Co. vs. A. F. Migeon et al.; Exhibits used on trial Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14.

Defense Rests.

Rebuttal.

John E. C. Barker, a witness called in behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. State your full name?

A. John E. C. Barker.

Q. Where do you reside?

A. Great Falls and Neihart; Great Falls is my residence.

Q. How long have you been living in Montana?

A. Since 1877.

Q. What is your business? A. Mining.

Q. What kind of mining?

A. Quartz mining principally.

Q. How long have you been in that business?

A. Since the fall of 1877.

Q. Are you acquainted with the city of Butte?

A. I am.

Q. Ever reside in Butte? A. Yes, sir.

Q. When did you go to reside there? A. 1877.

Q. Ever do any mining in Butte? A. Yes, sir.

Q. How long did you mine in that city or in that vicinity?

A. I mined continually there since, I can say, '78 until '83; the fall of 1883, November.

Q. Do you know what a prospector is? A. Yes.

Q. Have you ever had any experience in prospecting? A. Yes, sir.

Q. How many years experience?

A. Since the fall of 1877.

Q. You have been then a prospector as well as a miner? A. Yes, sir.

Q. Are you acquainted with the locality of the ground in dispute in this action? A. I am.

Q. When did you first become acquainted with it?

A. I think I was on that ground first in 1878.

Q. Go over the ground frequently since that date?

A. I used to ride over the ground.

Q. You say you were on the ground in 1878: can you recall on what particular occasion you went there; for what purpose?

A. Yes, in 1878 in a conversation I had with T. T. Baker, who was a surveyor in Butte, he told me about some very good veins that had been washed out in Missoula gulch in the placer mining there and he thought it would be a good idea to go over the different placer ground—

By *The Court.* That is not testimony.

Q. What occasion did you go down there for?

A. I went down there to see if there was any quartz veins in that placer ground.

Q. In this placer ground?

A. Not particularly on all the placer ground.

Q. Did you do anything about the ground we are now talking about?

A. I am satisfied in my own mind I was on that ground.

Q. Prospected around it?

A. I looked over it, but didn't see any quartz veins though.

Q. You have been on the ground since 1883?

A. Yes, sir.

Q. When were you last on the ground?

A. I was there on the 6th and 7th of April, 1895.

Q. What was the occasion of your going there at that time?

A. I went down with yourself to examine the ground, —and some other parties.

Q. At whose request? A. At your request.

Q. Tell us what you found when you got down there?

A. I found Mr. Baker and Mr. Hand; they were also of the party, and a man named Mr. Colbert, he went over the ground with us, and we examined the corners. They showed us where the corners of the "Childe Harold" was, a mining claim and also a placer claim—Mr. Noyes' placer claim—that is, they showed us the east end boundaries.

Q. Did you see any holes or excavations down there at that time? A. Yes.

Q. Did you make any examination of such holes or excavations? A. Yes, sir.

Q. What was the result of such examination—what did you see there?

A. Well, the first hole we went to I believe they called it the discovery hole, the discovery shaft: at least, Mr. Colbert said that was his discovery—in one end of that I seen the vein; I think it was on the east end. I also went down the shaft, but it was timbered up—lagged up. I didn't see anything further there, except the vein there on the east end.

Q. You say you saw a vein there—what, in your opinion as a mining man, did that vein carry?

A. Well, it looked like copper indications.

Q. Did you examine any other holes down there on that ground at that time? A. Yes.

Q. What holes did you examine?

A. I examined all the holes on the ground.

Q. There has been a hole designated on the plat here as C, on the tracing up there—I think it can be said that it is the hole with the fence around it.

A. You mean this hole here?

Q. Yes. It is designated C on the tracing above, isn't it? A. Yes, sir.

Q. Did you examine that hole? A. I did.

A. Tell the Judge what kind of a hole that is and what you found in it!

A. There is a hole there that is sunk from the surface about 9 or 10 feet deep and it is in a decomposed granite formation; I would call it a strata or a seam, although I have heard that they call it a vein. There is nothing that a man would classify as a vein; it is simply a seam in this decomposed granite that has 8 inches of lead matter for vein matter in it; that is what I would call it distinctly. It may be a strata off from

a vein, but that wouldn't be classified as a vein among mining men or prospectors either for that matter.

Q. Proceed with your statement.

A. I first took a sample from this here hole or shaft, 9 feet deep; it might be 10 feet on the west end—on the east end, and out of this crevice, that is the lead matter stuff there is 8 inches. I then took a picked sample on the west end of the very best that I could find, calling the sample 1 and 2. I then sampled the 2 feet of decomposed granite that laid on the west side of the vein; the vein I should take it runs east and west like most of the veins in Butte. I didn't go all over this ground; I went beyond those holes though.

Q. Confine yourself to that hole "C."

A. That is about all I did.

Q. You say you took three samples from that hole?

A. Yes.

Q. What did you do with those samples?

A. I assayed them.

Q. Have you had any experience in assaying?

A. Yes, sir.

Q. What was the result of those assays? I believe you have brought some of those samples into the courtroom?

A. Yes, sir, a portion of the ore I assayed; I saved that out of the samples.

Q. Take up sample Number 1; which of these is it?

A. This is sample Number 1.

Q. Tell us what the result of the assay of that sample was?

A. This sample is taken from 9 feet, from the vein

matter, at 9 feet deep, at the west end; I will correct that statement, when I said the first sample was taken from the east end: it assayed .05 ounces ($\frac{5}{100}$) of gold; 1.2 ($\frac{12}{10}$) ounces of silver and .60 of 1 per cent. ($\frac{60}{100}$) of 1 per cent of copper.

Q. That you say was a picked sample?

A. No, that is not the best sample; the best sample came from the east end.

Q. Take up the sample you call Number 2; show that to the Judge.

A. That sample Number 2 is from 8 inches, the same side as the other sample is taken from, at the same depth in the east end of the shaft; that is the very best that I could find in the hole. It assayed .10 ($\frac{10}{100}$) ounces of gold; 1.6 ounces silver and $\frac{25}{100}$ of 1 per cent of copper.

Q. You mentioned the other sample; from what part of the hole did you take that?

A. I took that on the west side; it is a decomposed granite and that sample went as follows: there is 24 inches of it at 9 feet deep. It went—a trace in gold; $\frac{2}{10}$ of an ounce in silver and a trace in copper.

Q. What in your opinion is that indication that you found in this hole marked C?

A. My opinion of it would be that it is a strata; there may be a vein close to it, but there is nothing to show that that is a well-defined vein at all.

Q. Would you call it an off-shoot or stringer?

A. Yes, it could be called that. I would say it was a strata or seam in decomposed granite. It is not what

mining men would designate as a well-defined vein or even a vein at all.

Q. What dip, if any, did that thing have in the C hole? A. It was pretty near straight.

Q. And did you notice the dip of what you found in the discovery hole?

A. What I seen of it, it was pretty near the same thing, dipped the same.

Q. How did these two holes compare with one another, the C hole with the A hole?

A. They didn't compare at all; one is a vein and the other is a strata.

Q. One looked better than the other?

A. Yes, a great deal.

Q. Confining your recollection to the year 1878 and confining your answer now to your opinion as a miner, what would you say as to that being such a discovery as would have warranted a location in that year?

A. I can speak for myself that I wouldn't make a location on it, and I am satisfied I wouldn't have made an assay on it, although it would not have cost me anything to make an assay, because that whole country there is full of those kind of stratas. You can get them any place.

Q. Would you have paid any attention to this seam if you had noticed it in 1878? A. Not then.

Q. Would you now?

A. Well, I might for building purposes or to locate it for the surface ground; I wouldn't work on it at the present time.

Q. Is that one of the industries of Butte, locating mining claims for town lot purposes?

A. Yes, sir, that is sometimes done; I may have done it myself.

Q. From your experience as a miner what would you say as to getting any ore out of these veins or seams that would justify working at the present time?

A. In that first shaft, called the discovery shaft, they might be able to take out some ore there that would run probably—it might, I have never had any assays, it might go 3 per cent or it might go 5 per cent.

Counsel for defendants objected to the witness testifying what the ore would carry without having tested it.

Q. I think I read you yesterday, did I not, certain assays, as testified to by Mr. Sticht? A. Yes, sir.

Q. As having been taken from that discovery hole?

A. Yes.

Q. With reference to those assay values, what would you say as to the workable quality of this ore?

A. It could not be worked even if they had a foot of solid ore right there to-day that would go 15 to 20 per cent in copper; it could not be worked at a profit; it could not be taken out and made to pay the expense of taking it out.

Q. That is predicated upon the existence of affairs now existing? A. Yes, sir.

Q. What would you say as to the condition of affairs in 1878?

A. I would say it would be utterly impossible to take any ore out of there in 1878, even if they had the showing I have seen there at the present time and make it

pay. There is a great difference there now from what it was in 1878.

Q. Were they working any copper mines in Butte in 1878?

A. I think the Rumsell Parrot, the Gagnon, and probably the Original was working.

Q. Do you recollect what was workable copper ore at that time; what percentage of copper it was?

A. No, sir, for the ore to carry before it would be workable. I didn't have any ore worked in 1878 or I didn't have any locations on copper veins, but I am satisfied it had to be a very high grade ore to pay for working in 1878.

Q. Why are you satisfied of that?

A. There were no copper smelters at all in the country. I think the Glendale smelter and the Wickes smelter were the only two smelters in the country at that time, and they didn't work copper ores.

Q. Do you know of any attempts to ship and work copper ore from any mines around there in which you were interested?

A. Not in 1878.

Q. Were you not interested in a mine there with one Young, Hank Young?

A. Yes.

Q. What mine was that?

A. I was interested in one that was called the Aurora, and I also had an option on one called the Cora that was a copper mine—that was classified as a copper mine.

Q. Do you remember the percentage of copper that the ores from these two veins or mines carried?

A. I know this—I had assays made from Young's place.

Q. Do you know what the copper percentage was of those ores?

A. I am satisfied that the Cora mine carried copper ore, a couple of feet of it, that would go probably 30 per cent, average of that; the Aurora only just had it in spots, copper ore in spots.

Q. Did those ores carry any silver?

A. Yes, silver and a little gold.

Q. What percentage of silver?

A. The Cora ore would probably average 40 ounces in silver.

Q. What was the result of working those ores?

A. I know the Williams smelter, they shipped one down from the Cora, and it didn't pay us; they had to quit working.

Q. What year was that in?

A. I think that was about 1882; I wouldn't say positively—somewheres near there.

Q. You have seen some placer mining, haven't you?

A. Yes, some.

Counsel for the defendants here interposed an objection to all the evidence given as to the percentage of copper that ore would have to carry in 1878 in order to pay the expenses of mining, on the ground that such evidence is immaterial and irrelevant, the question at issue being the existence of a vein or lode on the premises in dispute. The Court overruled the objection. Exception taken.

Q. Have you seen such seams as you have testified

to as being down on this Noyes ground exposed or worked in placer mining?

A. I know in one placer claim I was interested in at the head waters of Yankee Doodle gulch, I think in 1878 or '79—I probably made the location in 1878, we had a number of seams that were on the surface, seemed to be a brown oxidized iron seam; it had in some places a foot wide lead matter and near the surface it seemed to be broken up and as we got down to bedrock, it narrowed up and ran through the bedrock; that is it straightened out into little seams of brown oxidized iron matter, in fact played out; I have seen that.

Q. In your opinion what would you say about this particular seam or vein in C; what would be the result of placer mining around there?

A. I have seen a number of seams like that right in Butte; I didn't placer mine them out myself, but in going through different placer claims, I have seen different kinds of seams that on the surface were as good as that on the bedrock, where the bedrock was exposed, I have seen them straighten and go into the same kind of seams.

Q. What would become of them after the placer mining—what would be the result of placer mining on them?

A. No one ever worked on them; I couldn't tell.

Cross-Examination.

By *Mr Clark*. Q. You say the first time you were on these premises was along in '77 or '78? A. 1878.

Q. 1878?

A. Yes, I am satisfied I was on that ground, a portion of the Noyes-Upton ground.

Q. You said what led you to go down there was a talk you had with Baker with reference to placer mining in Missoula gulch and that following up that conversation with him, you examined a great deal of placer ground around Butte?

A. I went all over that.

Q. Isn't there a great deal of placer ground to the south of Butte?

A. Down to Rocker, yes, sir; I didn't go all over that.

Q. How big a territory down there south of Butte does this placer ground cover from Rocker on the west, how far east?

A. Over two miles in width; it may only be a mile in places; it extends clear down below Silver Bow.

Q. How long a distance is that?

A. To Silver Bow, I think it is eight miles.

Q. And you say on this occasion, the first visit, the occasion of your first visit, you went all over this placer ground?

A. I didn't go all over it; I went over a good deal of it; I went down to where Patsy Rice was working on some placer ground.

Q. You went over a considerable portion of it?

A. Yes.

Q. Do you remember how many days the trip occupied you?

A. I fooled away two or three days, perhaps a week.

Q. This was before a railroad was built on the flat?

A. Yes, sir.

Q. And before many buildings were put up there?

A. Yes.

Q. Wasn't it before the Parrot smelter was put up?

A. Yes, I don't think there was any smelter there at all in 1878.

Q. So that at that time, isn't it a fact that all this ground, this locality where this "Childe Harold" claim is, was a sandy flat, with no buildings on it, railroad buildings?

A. Yes, there were some buildings on it; I remember seeing a number of little log cabins.

Q. There were no landmarks there particularly, though?

A. Only where the placer ground was worked out.

Q. Take the particular portions of this placer ground covered by the "Childe Harold" claim; now what was there at the time you first went there in 1877, at or near the "Childe Harold" claim that leads you to identify it?

A. I will tell you why I know; I am certain I was on the Noyes-Upton placer ground because afterwards we were traveling on horseback in going to the Lowlands (?): we went to the left and got into the Lowland (?) district and one day I saw a man there and I asked what placer ground that was; he said it belonged to Noyes & Upton; I have gone over it pretty near every month in the year, while I was in Butte.

Q. You know that Noyes & Upton placer ground covers more than this "Childe Harold" claim?

A. Yes.

Q. Did you make a more particular inspection of mineral entry number 511 than any other?

A. No, sir.

Q. Didn't you make a general examination or inspection of all that placer ground?

A. I simply walked through to see if I could see any veins. I saw stratas all over the country, but we never paid any attention to those stratas.

Q. Isn't the surface down there covered with a layer of sand, with gravel, the placer ground?

A. It is covered with what we call washed gravel, and probably in some places the bedrock crops almost to the surface—in other places maybe 8 or 10 feet in depth; but where these water ditches run through it exposes the bedrock, a foot or two of it; it may be cut down deeper than that in places.

Q. When you say you saw these seams and strata all over that country at that time, you mean you saw them where these placer ditches had cut through the surface soil or sand? A. Yes.

Q. You say you didn't at that time see any excavations or holes there that you can identify with any holes on the map?

A. No, sir, I didn't see any hole like your discovery; if I had, I would have stopped and examined it.

Q. Would it not have been possible that the holes were there and you not see them?

A. Yes, sir, they may have been there; I may not have been right on that portion of the ground; I didn't say I was.

Q. You say in discovery A you saw a vein, a streaked copper ore? A. Yes, sir.

Q. Take discovery C: you say in discovery C what you found was nothing but decomposed granite?

A. No, I said there was a strata there that had lead matter between two decomposed granite walls.

Q. That is in shaft C? A. Yes.

Q. You say it was within decomposed granite walls?

A. Yes, sir.

Q. And about how wide was it? A. 8 inches.

Q. What was the material between those decomposed granite walls?

A. It was nothing more than a lead matter.

Q. What is a lead matter?

A. A lead matter is a gangue that accumulates generally near or where ore veins exist.

Q. Lead matter is an indication of the nearness or existence of a vein?

A. You can find lead matter in little seams 2 inches wide or alongside paying veins.

Q. Lead matter alongside too might lead to a vein that would be two feet wide?

A. I don't think it would in this case.

Q. Generally speaking, isn't it possible that a seam such as you describe, two inches wide, if followed, might lead up to a well-defined vein?

A. I have never found it; I never worked on one that small---that was two inches wide.

Q. You don't know, but if you had in your experience worked on one that small, it might have led up to a vein?

A. It might be the case, but I wouldn't start to work on a seam two inches wide.

Q. This one was 8 inches wide? A. Yes.

Q. You say you call this a strata or seam?

A. Yes, sir.

Q. What is the difference between a strata as you understand it and a vein?

A. A strata is nothing more nor less than what would be termed a branch of a vein, shooting out from under or a small strata in the formation.

Q. You say it is a branch of the vein?

A. Sometimes, yes; they designate it that way; that a strata is a branch off a vein.

Q. How do you determine—suppose you find in your examination of mining ground a strata, how do you know that is a branch of the vein?

A. I don't know at all; I would call it a strata until it led into a vein.

Q. It might lead into a vein?

A. Yes, sir, it might lead into a vein.

Q. Has a strata well-defined boundaries?

A. Sometimes they have and sometimes they have not.

Q. If it is a strata and hasn't well-defined boundaries, how do you distinguish it from the surrounding rock?

A. If there is a breakage in any of the rock—and we find often that it occurs all over the country—and it is filled with lead matter or waste or tael, we call that a strata; we don't call it a vein, though.

Q. And still you say these stratals are branches of a vein?

A. I don't always say they are branches of a vein. I have seen stratas leading off from a vein.

Q. Didn't you say the definition of a strata was, it was a branch of the vein?

A. It is sometimes called that by miners and by prospectors.

Q. Then we will take this strata as you call it, in discovery hole C. that was 8 inches wide: that might be a branch of a vein? A. Yes, sir.

Q. You don't know whether the vein of which it might be a branch is or is not in the "Childe Harold" ground?

A. I couldn't say that that strata is along there, all along there: at the present time there are decomposed granite walls on both sides of that strata. †

Q. And you say these strata occasionally lead to a vein or might lead to a vein; if that is the case and you haven't followed this, how do you know this does not lead to a vein?

A. This may lead to a vein, but all veins pretty near in Butte, in every direction, run easterly and westerly direction; these strata going over the country, in a northerly and southerly direction might go into a vein; this one here might bear on this course a certain way and that strata might possibly play out; I think when you got down to solid bedrock, I think that would play out: that is my opinion of the number C hole.

Q. How far down into this hole C does this strata extend? A. To the bottom.

Q. And how deep is that hole C sunk in bedrock?

A. I think that the surface is about two or three

feet deep on top and probably 4 or 5 feet deep in depth; it got some harder.

Q. It did get some harder at four or five feet in depth?

A. Yes; it is harder at the bottom than at the top.

Q. And it didn't pinch out as far as you could see into that hole?

A. No, sir. it didn't pinch out there.

Q. Do you remember whether or not it is wider at the bottom of that hole than at the top?

A. I think it is wider at the top; I think Mr. Hand said it was over 10 inches at the top.

Q. Isn't it true in the course of your mining experience, you have seen what you now know to be veins, or what proved to be veins, which at the surface carried this decomposed matter of which you speak?

A. I have seen it, but there was always quartz generally along with it.

Q. You say in hole A there is a well-defined vein?

A. Yes, sir.

Q. Now you say that these strata, as you call them, sometimes lead to veins; how do you know, if you haven't followed this particular strata in hole C you speak of, that if followed, it would not lead to and connect with the continuation of the vein in the discovery of hole A?

A. Of course no man can see into the ground, but there is nothing there to indicate there the same character of ore, because A has ore in it and C has not; that is the difference.

Q. You say you made some assays?

A. Yes, I took the very best I could.

Q. And it showed some mineral?

A. Yes, and I think the granite around there will go almost as much, but it didn't go in my assays quite as much.

Q. Did you hear Mr. Tibbey's testimony yesterday?

A. No, sir.

Q. Well, I will say that Mr. Tibbey testified yesterday that he took specimens of rock, this here, at this side, took them from this hole C—

Witness. No, there is nothing like that in hole C.

Q. Along in 1878 there were several copper mines running in Butte and about that time you had an interest in the Cora mine?

A. No, I had no interest in the Cora mine, not in 1878, in 1882 I had an agreement with Hank Young whereby if I sold the mine for anything over \$90,000, I was to have it. I can go further into the details—

Q. Was the Cora mine a copper mine?

A. Yes, sir. copper and silver.

Q. In 1882 the owner of the Cora mine thought it was worth \$90,000? A. Yes.

Q. Had it been developed to any extent in 1882?

A. 200 feet level and drifts run through the same place, it ran 200 ounces in silver.

Q. And you say to the best of your opinion, the Cora produced ore that would carry 30 per cent copper?

A. They had a vein two or three feet wide, that would run that.

Q. And even then, at that time, it wouldn't pay?

A. No, sir.

Q. The Cora mine is owned by Mr. Young and others at the present time?

A. Yes, sir; I will tell you why I know it. I brought this man Anson Ford out from Denver to examine the property and he came there and we took away samples and he told me Young——

Q. Never mind that—— If the 30 per cent copper which the Cora mine produced in 1882 wouldn't pay the expenses of smelting, then certainly you would say, would you not, as a miner, that the location of the Cora claim upon such a vein as that, was not a valid location?

A. No, sir, I wouldn't.

Q. What do you say of it?

A. The Cora vein is a vein from 8 to 10 feet wide, average that all the way through; some places 15 or 20 feet; some places they had ore running 2 or 300 ounces, free-milling; they had a streak of copper ore, 2 to 4 feet wide and that ore all the way through will carry somewhere from 25 to 40 ounces of silver and may be 40 per cent copper and I know they could not make that ore pay in those days and they shut down the Cora.

Q. Do you think 25 or 30 per cent copper ore will pay now?

A. Not unless you have gold with it. I shipped ore from Copperopolis of late years to the Parrot Mining Co.; my recollections of it, it went about 38 per cent, it may have been—it was in that neighborhood, perhaps 39; I think it was 38 per cent. I shipped this copper ore from Copperopolis in, I think that was 1889, it may have been 1890 and copper was a pretty good price; it was quoted I think about 13 or 14 cents, and I shipped

that over to the Parrot smelter and on the whole car-load of ore—I think there was 20 odd tons—I think we got about \$150 out of it and it was the finest copper you could get, a carbonate of copper; when we paid the expenses of hauling it, we came out in debt.

Q. Do you know the Anaconda mine? The property of the Anaconda syndicate in Butte?

A. Yes, I have seen it and been on the ground.

Q. Do you know how much copper to the ton of ore taken from that mine? A. I couldn't say, no, sir.

Q. Do you think it averages 30 per cent?

A. No, sir. I am satisfied it don't.

Q. The Anaconda mine is a copper mine?

A. Yes, sir.

Q. It is understood to be a paying property?

A. Yes, sir, it is a paying property, but there may be something more in it than copper.

Q. Do you know what the ore in the Parrott mine averages, copper to the ton?

A. No, sir, those are big concerns and may have big veins and that cuts a great deal of difference where the mine has 50 or 100 feet of ore, that will go 10 or 12 per cent copper; it makes all the difference in the world.

Q. All the developed mines that you ever knew anything about had veins over 8, not less than 8 feet wide from the surface?

A. No, sir, I have worked on lots of them that were less.

Q. Mines that pay—developed mines?

A. No, sir, not very well developed; some of them would have two or three feet of ore well developed.

Q. As to what constitutes a vein; there isn't any rule as to the width at the surface?

A. No, sir, but a mining man, a prospector, they sometimes designate what is a vein and what is not a vein; if they seen a seam in the rock that they thought wasn't a vein, they might call it a seam or strata, and they might think it was from a vein and it might not be: it might be only a break in the vein.

Q. Sample number 1 of which you testified, the assay of which you testified, you say went 1.2 ounces silver and 1-20 of one per cent in gold; did you ever know of a prospect being located or of a mine being developed upon a surface prospect which didn't show anything didn't show any trace of mineral at the surface?

A. No, sir, not in my experience; I never knew a man that would dig on a thing that didn't assay or didn't prospect; I think it is impossible to get a man to dig on such a hole.

Q. How is it with those prospectors when they are far away from any assayer; how is it they make locations and do work of exploitation on what they regard to be a vein?

A. The first thing that a prospector will do when he strikes a vein that he thinks has got something in it, he may stake it right then and there and he may sink a hole on it and put up a discovery, and there is lots and lots of cases where they have located a vein and put it on record, but before they will do any great amount of work they will take the samples and have them assayed. There are certain prospectors who are good assayers; take them through the hills, if they have a vein that

carries pure gold, they will pan it out and other prospectors will take their ore, burn it in the forge or fire and throw it into cold water and blister it: that is a silver test; if it is lead, they are at a loss and have to send it to the smelter.

Q. Those are some tests!

A. That is what you call prospecting with common-sense and a jaekknife.

Q. There is nothing certain as to the value of the mineral?

A. No; I have seen lots of rock blistered that satisfied me.

Q. It is not as certain as an assay? A. No.

Q. Then you never knew in the whole course of your experience as a miner, you never knew a mine or claim to be located upon vein or lead matter, which assayed 1.2 ounces of silver and 5-100 of one per cent of an ounce of gold to the ton?

A. Yes, I have; I have made locations on veins myself that only went 3, 4 and 5 ounces of silver, and some of them lower than that, but I found good float on the ground, and lots of other men have located on veins when they thought they could find something on it, and may have worked on them some, too.

Q. You say this matter in hole C—this decomposed granite, as you call it—gets harder as you go down to the bottom?

A. No, the matter does not get harder; I say the granite on the walls of the strata gets harder.

Q. And what change happens to the stuff between these granite walls?

A. There is no change at all at the top. It was probably more decomposed, being nearer to the surface.

Q. What caused this decomposition?

A. Exposure to water and air and the snow.

Q. What would be the character of that same material if you got below water line; would it still be decomposed?

A. No man can see into the ground, but if I was to pass an opinion as to what would become of that strata it would be this—that I believe that that strata will get so small that nobody will care to work it; I think that in hole C is nothing but a strata, and will play out.

Q. Isn't it true from your experience as a miner that what were veins on the surface pinch out after they were followed down?

A. No, sir, in some localities they don't pinch out, and I have seen small veins, not exactly an 8 inches streak; I have seen them hold out and I have seen them pinch in.

Q. Your best judgment is, if you followed this strata down far enough in hole C, it would pinch out?

A. I don't think there is anything there to indicate its strength.

Q. That is just your opinion?

A. Yes, that is my opinion; I say that conscientiously.

Q. Do I understand you to say that decomposition in the granite or any other rock is not a sign that there may be mineral in the rock lower down?

A. No, sir; you are liable to find mineral in anything even in granite. I have found granite at a depth of 8

or 900 feet in cross-cutting from one vein to the other, 50 to 100 feet away from the vein, that has gone as high as 8 ounces in silver, but it is something that don't often occur: but all granites pretty near, in a section like Butte and especially where they are decomposed, I think they all assay something. You may get spots that will assay very good. I know on the Clarke fraction, the granite on one side of the wall—the mineral impregnated the wall so that it went two or three ounces.

Q. You say in this hole C, this decomposed granite had a dip? A. No, sir, I didn't say that.

Q. What did you testify?

A. I said it was going down almost straight, perpendicular.

Q. How could you tell what direction it went down?

A. Well, I didn't have any compass or any level.

Q. What did you see that led you to believe that it went down perpendicularly?

A. I seen this strata about 8 inches wide; I am satisfied that is very close to it; it might be 7 or 9, but I would call it 8 inches from the sample I took and it is defined; you can see it on both sides, both ends of the shaft.

Q. And it is 8 inches wide? A. Yes, sir.

Q. It covers the whole width of this decomposed matter? A. No, sir, it does not.

Q. What is the whole width of this decomposed matter, the strata as you call it?

A. The decomposed matter is the granite on both sides: that might be 500 feet wide; it might be a thousand feet wide.

Q. What is this 8 inches you speak of?

A. That 8 inches would be termed lead matter or the gangue that accompanies the lead matter.

Q. And on each side of that 8 inches strata, there is matter, welldefined, of an entirely different character?

A. Yes, it is well defined.

Q. You say the whole country is full of these seams or strata?

A. I wouldn't say the whole country, but you take around through the placer mines, you can see those strata all around the country. I haven't been clear down below Silver Bow.

Q. I mean in the immediate vicinity of Butte?

A. Yes, sir.

Q. The whole country in the immediate vicinity of Butte is covered with located claims?

A. Yes, I think they are pretty much.

Q. Do I understand you to say there was something in this seam or strata that indicated oxidized iron?

A. No, sir, I never made any such statement.

Q. Didn't you say anything about it?

A. No, sir.

Q. Did you see any evidence of oxidization there at all?

A. I wouldn't call it such; I didn't see much there to oxidize, without it was decomposed granite.

Redirect Examination.

By *Mr. McIntire*. Q. In talking about this Cora mine, where is it located with reference to this flat?

A. It is up on the hill, probably three miles away from that.

Q. Are there any lodes or mines that were worked in 1878 or prior to that time down where this "Childe Harold" claim is?

A. No, sir, not at that time.

Q. If there had been you would know it?

A. Yes.

Q. The value of ore is predicated upon the facility with which it can be worked?

A. Yes, sir, generally; but sometimes men will hold on to ore with the expectation of getting a cheaper way to work it, when the railroad comes in.

John Noyes, a witness called in behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. Butte City.

Q. How long have you resided there?

A. It will be 29 years in June.

Q. What is your business? A. Mining.

Q. What kind of mining?

A. Principally placer.

Q. Have you done any quartz mining?

A. Yes, some.

Q. Have some knowledge of that business also?

A. Yes.

Q. Are you the John Noyes that made application for patent to mineral entry No. 511? A. Yes, sir.

Q. Do you remember when that application was made? A. Yes, sir, it was made in 1878.

Q. You were acquainted with that ground when you made application for patent? A. Yes.

Q. What was the ground? A. Placer ground.

Q. Was it valuable ground for that purpose?

A. Yes, it was very good ground.

Q. Are you acquainted with the location on that ground known as the "Childe Harold"?

A. Yes, sir.

Q. When did you become acquainted with that claim?

A. I think it was in 1877 or '78.

Q. It wasn't called the "Childe Harold" then?

A. No, sir.

Q. Who owned it?

A. It belonged to Colbert.

Q. What do you know of that location made by Colbert?

A. They wanted to sell it to me. I went to see it and they told me I could have it for \$100. I looked at it and told them I didn't want it.

Q. Why didn't you want it?

A. I didn't think there was anything in it.

Q. At that time you owned this placer ground?

A. Yes.

Q. At the time you had this talk—it must have been after your location of the placer ground?

A. Yes, sir.

Q. You made your location of placer ground on October 15, 1878? A. I don't remember.

Q. If that was the time you made your location, it was after that you had your talk with Colbert?

A. I owned the ground when I talked with Colbert.

Q. Had you owned it prior to the time you made the location of it? A. No, I didn't own it.

Q. The records show that you located this placer ground on October 15, 1878; the records further show that you made application for patent on December 17, 1878, on this piece of ground; now the time you saw this hole and had the talk with Colbert must have been after those dates or after the first date?

A. No, I don't think it was in October; I think it was early in the season; it may have been before I located or it may have been the spring after; I don't recollect.

Q. When you were down there you went on the ground with Colbert or saw him there?

A. Yes, sir.

Q. What was he doing?

A. He was placer mining.

Q. Did he show you any of those holes that were testified to in this case?

A. He showed me his discovery hole.

Q. Can you identify that hole on this map?

A. Yes, it was here.

Q. How much of a hole was that when you saw it?

A. Between 6 and 7 feet; I should think it was about that, in depth.

Q. Was there any other hole around there?

A. I don't recollect seeing any.

Q. No other hole was shown you? A. No, sir.

Q. If there had been a hole of some 8 or 10 feet in depth around there at that time you would have seen it?

A. I would have seen it.

Q. What do you say as to the character of what you saw in that hole in 1878—what did you see there?

A. I didn't pay much attention to it; it was principally a green stain, I thought; up on the side hill there at another place there was plenty of green stain there, and I paid no attention to it.

Q. See the same stains in other placer ground?

A. Up across the flat.

Q. Had you seen any such seam or strata like that in other placer ground?

A. No, sir. There wasn't any green stain around in most of the other places.

Q. You have had considerable experience in placer mining?

A. Yes, sir.

Q. In regard to those seams or strata found there, what would be the result of that after placer working?

A. I can't recollect of one that has turned out any money.

Q. At the time you saw this hole, what would you say as to the comparative value of the ground for placer purposes or quartz purposes—upon this location as shown to you by Mr. Colbert?

Counsel for defendants object to the question as incompetent and irrelevant. Objection overruled. Exception taken.

A. The ground was good for placer mining.

Q. Make a comparison between the ground for quartz purposes and placer purposes?

A. I didn't consider it good for anything for quartz.

Q. It would be better for placer mining than for quartz?
A. Yes, sir.

Q. Do you remember any copper mining being done in Butte or its vicinity in 1878, or before 1878?

A. Yes, sir.

Q. Do you remember what quality of ores, what percentage of copper the ore had to carry, before it could be worked?
A. I think about 32 per cent.

Q. Ores then under that percentage were considered as having no value in those days?

A. I don't think it was bought by anybody.

Q. The prices of mining supplies and materials were quite expensive prior to the coming of the railroad?

A. Yes, sir.

Q. The railroad got into Butte at what time?

A. I can't tell you the year.

Q. The railroad first got there in 1882?

Mr. Clark. I admit that.

Mr. Clark. I desire to interpose an objection to Mr. Noyes' testimony in regard to the percentage of copper ore had to carry in 1877 and '78 to make copper mining pay; the same objection I interposed to testimony on same point by Mr. Barker.

Objection overruled. Exception taken.

Witness. It had to go about that per cent when they used to haul it from Butte.

Q. And that condition of affairs existed up to the coming of the railroad?
A. Yes, sir.

Cross-Examination.

By *Mr. Clark.* Q. Do you know whether there were any copper mines—that have since proved to be copper mines—located in those days, in 1877 or '78 in Butte?

A. That were located at that time that are good copper mines to-day?

Q. Yes. A. Yes.

Q. The Parrott is a copper mine? A. Yes.

Q. Was the Parrott located at that time?

A. Yes.

Q. Was the Anaconda located at that time?

A. I don't think it was.

Q. Do you know the Mountain View mine?

A. Yes, sir.

Q. That is a copper mine? A. Yes, sir.

Q. That was located in those days?

A. I don't think it was.

Q. Was the Ramsdell Parrott mine located in those days? A. Yes, sir.

Q. And there were quite a number of copper mines in 1877 and 1878 that had locations upon them that have since developed into copper mines?

A. Yes, sir.

Q. Do you know what the average percentage of the copper is in the ore of the Mountain View, or the Parrott? A. No, sir.

Q. Or the Anaconda mine proper? A. No, sir.

Q. Don't you know from your general information in regard to mining that there are in Butte copper mines working to-day, and have been working for years, that carry much less than thirty per cent of copper?

A. Yes, sir.

Mr. McIntire. That ought to be confined to 1878.

Q. I understood you to say that you had been placer mining principally but had done some quartz mining?

A. Yes, sir.

Q. During what years was the most of your quartz mining done?

A. I haven't done any quartz mining, that is done the work myself; I have leased claims to other parties.

Q. Did you ever do much quartz prospecting?

A. No, sir.

Q. And in 1877 and '78 your principal business was placer mining? A. Yes.

Q. Up to 1877 or '78, had you ever done any quartz mining? A. No, sir.

Q. You say you became acquainted with this "Childe Harold" ground in 1877 or '78?

A. That is the quartz claim.

Q. Can you locate more definitely than you have in your location in chief the time you had a talk with Mr. Colbert about your buying this ground?

A. I cannot: my recollection of dates is very bad.

Q. Can you testify that it was not in the year 1877; are you positive whether it was 1877 or '78?

A. Well, I think it must have been 1878 or '79, I don't know which; it may have been 1879.

Q. Didn't you say in your evidence in chief that it might be before you had made your placer location?

A. It may have been.

Q. You made your placer location in 1878, didn't you? A. I can't tell exactly what year.

Q. He showed you at that time, you say, the hole marked discovery C on that map?

A. Yes, sir.

Q. And that was about 5 or 6 feet at that time?

A. Yes, sir.

Q. These are the maps that have been introduced in evidence here; this is the point of original discovery and the point to which you probably refer now. State whether or not at that time, when you had this conversation with Mr. Colbert, you saw any holes further to the west?

A. There wasn't a hole to my knowledge.

Q. Did you make a careful examination of the ground to the west of the discovery hole?

A. After I made my entry, the next summer.

Q. At that time—I mean at the time you had this conversation with Mr. Colbert, state whether or not you made an examination of this ground to the west of discovery hole A, as marked on that map?

A. There wasn't but one hole on the ground and that was within 500 feet of that ground.

Q. You made a careful examination of the ground for 500 feet west of that ground?

A. It wasn't necessary to walk over it; I could see it.

Q. Did you walk over the ground?

A. I walked over the ground, yes, sir.

Q. You swear positively there was no other hole or excavation on the ground but this point of discovery of which you speak?

A. There was one hole, about 500 feet or thereabouts.

Q. In what direction from the discovery?

A. West.

Q. How deep a hole was that?

A. Between 10 and 12 feet.

Q. Did you make an examination of that hole at that time?

A. Yes, sir.

Q. What did you see there?

A. Gravel.

Q. A square hole or a round one?

A. A round one.

Q. Did you see bedrock in it?

A. Yes, sir.

Q. How deep was it below the bedrock?

A. It only went to bedrock.

Q. What was the character of the material in the sides of that hole?

A. Gravel; pay gravel at that.

Q. What was the character of the bedrock?

A. Granite.

Q. Do you know by whom that hole was excavated?

A. No.

Q. And you state positively there was no hole between 75 and 100 feet to the west of this first discovery hole on the same line with it, at that time?

A. No, sir.

Q. At the point of discovery you say you saw a green stain?

A. Yes, sir.

Q. Did it look anything like this; any of these pieces here?

A. Yes, something.

Q. What does that indicate there, that green stain?

A. I considered it stained granite.

Q. What does the green color indicate; what causes the green stain? A. Copper.

Q. You say that this seam or strata that you saw in discovery hole A at the time you went there and had this talk with Mr. Colbert, are seams or strata which you have frequently seen in placer ground?

A. No, sir, I didn't say anything of the kind.

Q. State what you did say?

A. I say the stain, green, that is the only place I have seen it on the placer ground, but I have seen it off on the side hill.

Q. And you say—didn't I understand you to say that seams or strata like this one you saw at discovery A, never turned out well as far as you know?

A. I can't recollect now of a place in Butte where any of those small stratas ever have turned out any money.

Q. Did you hear these witnesses, Mr. Parker and others, testify that there had never been any developed mines, any mines developed, upon this placer ground down there where this "Childe Harold" is?

A. I don't recollect whether I did or not.

Q. Have there as a matter of fact to your knowledge been any mines exploited or developed upon that flat?

A. Yes, there is.

Q. How near to this ground in question?

A. There is the Ground Squirrel; I don't think it is over 3 or 400 yards.

Q. The Ground Squirrel is a developed mine?

A. I think it is, yes, sir.

Q. There never has been, however, as I understand you, upon your mineral entry number 511?

A. No, sir.

Q. When you say these seams or strata have never turned out in placer ground, you don't mean to say that these seams or strata have never turned out in your placer ground? A. No.

Q. Because they have never been followed out or exploited down there? A. No.

Q. How do you know but that if this strata or seam that you saw that day when you went with Mr. Colbert, if exploited, would not turn out to be a vein?

A. I don't know.

Redirect Examination.

By *Mr. McIntire*. Q. You say there have been mines developed on this flat south of Butte where your placer ground is located? A. Yes, sir.

Q. When was the Ground Squirrel located?

A. Four or five years ago.

Q. And the exploitation of the Ground Squirrel has been in the last few years? A. Yes, sir.

Q. Very many years subsequent to 1878?

A. Yes.

Q. Do you know whether any mines, that is quartz mines, were worked on the flat, to the south of Butte, in 1878 or for two or three years subsequent to that time?

A. No, sir; there was not.

Q. You were interrupted by Mr. Clark when you were telling about an examination you made of this

ground with your surveyor when you made your application for patent; you may say now what you were interrupted from telling?

A. In the winter we went through with the advertising, and the next summer I got my patent, and after I got my patent I went to have my surveying correct; I knew of this lead being there and being claimed, and I can say positively that I had never seen a place on the ground where there was a pound of ore in place.

Recross-Examination.

By *Mr. Clark*. Q. You say the Ground Squirrel was not located until four or five years ago to the best of your recollection? A. I think so.

Q. Is it not a matter within your knowledge that the ground covered by the Ground Squirrel was originally patented as placer ground, and held as placer ground?

A. Yes, I was interested in it, too.

By *The Court*. When you applied for patent on this placer ground, did you know of any mineral bearing ledge within the limits of your ground?

A. No, sir, and no person else did.

By *Mr. Clark*. Q. How do you know that?

A. Because there was no place where it showed on the surface, and there was no place where it was dug; this discovery is outside of my application.

De Grasse A. Palmer, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. In Butte.

Q. How long have you resided there?

A. Off and on ever since 1865.

Q. What is your business? A. Mining.

Q. What kind of mining?

A. Placer and quartz.

Q. Are you acquainted with the flat that is to the south of Butte, around the Montana Central ground and depot?

A. Yes, sir.

Q. You have been in that valley? A. Yes, sir.

Q. Did you ever do any mining around there?

A. Not much.

Q. Ever do any placer mining there?

A. I did placer mining a little beyond it, to the west of it a little.

Q. Were you acquainted with the ground as far back as 1878?

A. Yes, sir.

Q. You knew it in 1878? A. Yes, sir.

Q. What kind of ground was that down there in those days?

A. It was worked at that time for placer ground.

Q. Were there any quartz leads down there to your knowledge in those days?

A. Not that I know of.

Q. Were there any working mines down there anywhere in that section, down in the valley?

A. No, sir; placer or quartz?

Q. Were there any quartz mines worked?

A. I don't know of any worked.

Q. The quartz mines are generally situated, or were in those days entirely situated, on the hill east of Butte, where Meaderville is?

A. Yes, most of them; some further west, down on the bottom.

Q. Have you been on the ground in controversy in this action, that piece of ground now called the "Childe Harold"?

A. Yes, sir.

Q. When were you there?

A. I have been there a good many different times; I was there the other day.

Q. Did you examine any of the holes or excavations on that place down there?

A. Yes, sir.

Q. Which? Can you designate which on the map or plat?

A. The ground I examined, it was the hole with the fence around it, known as the Charley Colbert hole Number 2.

Q. You were in that hole?

A. Yes, sir.

Q. Were you in any other holes on that ground?

A. No, sir.

Q. What did you see in that hole with the fence around it?

A. I saw some stain, some lead stain there—granite—a kind of a seam or strata.

Q. What was in that strata or seam you speak about?

A. I believe there was a little quartz in place in it; pieces of quartz; little pieces of quartz.

Q. What would you call that seam or strata—would you call it by any other name?

A. I couldn't call it a vein.

Q. What would you say as to such seams or strata being found on that flat over there?

A. It was found all over the flat, all over the old placer ground there, and all through the flat.

Q. Your experience as a miner has been long enough to enable you to give an opinion as to the value of that stuff?

A. I can give my opinion of it.

Q. In your opinion would that stuff you saw in that hole there have a locatable value?

A. I wouldn't think so.

Q. Would you locate a claim of that?

A. I wouldn't, I don't think; that is, for mining purposes.

Q. For quartz mining?

A. No, sir.

Q. What do you mean by saying not for mining purposes? Would you locate it for some other purpose?

A. Yes, it might be valuable for surface ground.

Q. That is the condition of affairs that is existing there now; what would you say, carrying your recollection back to 1878; would it have been worth locating then?

A. I wouldn't have located that hole then or now either, that is for lead matter.

Q. Is there any stuff in that hole; there is no lead matter there that would in your opinion justify work and exploiting?

A. No, sir.

Q. Do you know what a stringer or off-shoot is between leads?

A. I have an idea, yes, sir.

Q. What would you call this thing down there?

A. I would call it a stringer or off-shoot from a lead.

Q. In 1878 was there any copper mining done in Butte to your knowledge? A. Yes, sir.

Q. In what section of Butte?

A. Up on the hill as a general thing—the Parrott.

Q. Was there any copper mining done in this valley we are now speaking of in that year?

A. Not that I know of.

Q. Do you remember what was the minimum percentage of copper that would permit the ore to be worked and shipped in 1878?'

Same objection as to similar questions before.

Objection overruled. Exception taken.

A. I know they couldn't ship ore at that time unless they thought it ran pretty high in copper.

Q. You don't know the percentage of copper they would have to have? A. No.

Q. It would have to go pretty high? A. Yes.

Q. In your judgment, both from your knowledge as a quartz miner and a placer miner, what would be your opinion as to the comparative value of the ground down there in 1878 for placer mining purposes and for quartz mining purposes—this "Childe Harold" ground?

Same objection as to similar questions before.

Objection overruled. Exception taken.

A. I think it would be only valuable at that time for placer mining.

Cross-Examination.

By *Mr. Clark.* Q. I understand you to say you wouldn't locate this ground down there for mining purposes? A. That is that strata.

Q. You say you might locate it for some other purpose?
A. Yes.

Q. For surface ground?
A. Yes, sir.

Q. When you make a location of ground as mineral land under the laws of the United States, you make an affidavit and swear it is mineral land, subject to entry as a quartz claim?

A. Yes, sir, there is mineral in that.

Q. Then if you would locate this ground for surface ground, you would make an affidavit to something that wasn't true?
A. Yes, sir.

Q. You say in this strata that you saw in hole C, when you were there the other day, you saw a lead stain?
A. Yes.

Q. What is a lead stain?

A. It is something that has drifted from a lead, such as iron stain or copper stain or anything of that kind.

Q. It shows a lead?

A. It shows a stain from a lead, that is, naturally, it is from a lead; the strata from a lead.

Q. What is a lead?

A. The vein running through the earth; a vein of ore or quartz; that is the way I would define it; I am not an expert at those things.

Q. You mean to say that you can find these seams and strata like this one in hole C all over this flat?

A. Yes, sir.

Q. Isn't that whole flat covered with a sandy surface, gravel?
A. Yes.

Q. How can you tell that these seams or strata occur all over it?

A. By cleaning those off and scraping the bedrock. I have cleaned a whole lot of it; I have run over those leads for a mile and cleaned the bedrock and scraped them.

Q. This flat is south of Butte? A. Yes, sir.

Q. At the foot of the hill on which Butte is built?

A. Yes, sir.

Q. Isn't it a fact that on the hill where these mines are located, there are seams running all over it?

A. There are leads down on that bottom; there is no question about that.

Q. What do you say about the possibility of this strata or seam in hole C if followed up connecting with a vein somewhere?

A. It may connect with it, certainly.

Q. How wide was it in hole C?

A. This seam down there? You couldn't tell exactly. There is a good deal of granite among it. There was a little seam from 2 to 3 inches of quartz in it; the pieces would be about as big as your finger.

Q. Quartz is vein matter? A. Certainly.

Q. Were those pieces of quartz in place?

A. They were in the seam.

Q. In place?

A. They were in the seam, in place you might say.

Q. What were the boundaries of this seam or strata on each side?

A. Granite on each side what I saw.

Q. Have you ever had any experience with developed mines? A. Yes, sir.

Q. And prospects too? A. Yes.

Q. Is there any rule about how wide a deposit of vein matter has to be, in order to constitute a lead?

A. No, sir, I don't think there is.

Q. It could be anywhere from 2 inches to 200 feet, couldn't it?

A. Yes, it could be, I suppose.

Q. You say you were in Butte placer mining in 1877 and '78?

A. You can find leads in some localities wider than others; in some localities they are very narrow.

Q. And as you follow them down, they vary in width?

A. Some, yes, sir.

Q. Don't they a good deal?

A. Yes, in some localities they do and others they don't.

Q. In 1877 and '78 you were mining in Butte?

A. Yes.

Q. There wasn't a railroad there?

A. No, sir.

Q. Didn't people expect they would have a railroad there soon?

A. If I had, I would have held on to a lot of property I had.

Q.¹ What kind of property?

A. Quartz.

Q. Don't you suppose there were some people who expected a railroad would be built there some day?

A. I expect so.

Q. In 1878 you say you knew this ground there?

A. Yes, sir.

Q. Can you swear that in 1878 there were no excavations upon this section of ground that is covered by the "Childe Harold"?

A. I couldn't swear to that.

L. S. Scott, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. In Butte City.

Q. How long have you lived there?

A. Since 1875.

Q. What is your business? A. Mining.

Q. What kind of mining? A. Quartz mining.

Q. How long have you been a quartz miner?

A. Since 1873, that I first started in.

Q. Are you acquainted with the ground south of Butte on which the Montana Central Railroad is located?

A. Yes, sir.

Q. Where its freight and passenger depots are?

A. Yes.

Q. How long have you known that ground?

A. I first became a little acquainted with it in the fall of 1875.

Q. What is that ground down there with reference to its being mountainous or a valley?

A. It is in a valley.

Q. Had there been any mining on that ground in those days?

A. There had been a great deal of placer mining.

Q. It was placer mining ground? A. Yes, sir.

Q. You say you became acquainted with it in 1875?

A. Yes, sir.

Q. What were you doing down there in 1875?

A. Hunting for quartz veins.

Q. Did you find any? A. No, I did not, then.

Q. Did you find any after 1875? A. No, sir.

Q. Did you ever hear of a location down there called the Colbert location? A. Yes, sir.

Q. Do you remember what name that was given in those days?

A. No, I don't know what name it was.

Q. Have you been on that ground recently?

A. Yes.

Q. Have you seen the claim down there called the "Childe Harold"? A. Yes, sir.

Q. With reference to what is called the Colbert location, what is this "Childe Harold"?

A. It is on about the same ground.

Q. When did you first hear of that Colbert location?

A. I think it was in 1877, to the best of my knowledge.

Q. Did you have occasion to examine it?

A. Yes, sir.

Q. State under what circumstances you came to examine it?

A. I heard that Charley Colbert had struck a copper vein there, and I went down to see it shortly afterwards, and I saw a hole there of green ore, down about 5 or 6 feet where it had been shoveled out: then I afterwards went back, some time, I don't remember when it was, with the view of taking a lease on it, and I went to it a second time and took a look over it, but I didn't see any material change in it, so I made up my mind I didn't want it.

Q. What was the reason for not taking hold of it?

A. I didn't think it would pay.

Q. That was about a year after the first time you were there?

A. It may have been a year; it may not have been so long; I don't remember.

Q. Did you prospect the ground around there at that time or either of those times you were there?

A. Not particularly over that ground; I just took a look around there.

Q. Did you see any other holes?

A. I don't remember seeing any other holes.

Q. I presume if you had seen any hole of any considerable size there you would have examined it?

A. I think I would.

Q. You were looking at this ground with a view of ascertaining whether it was a vein or not?

A. I was looking at it to see whether it would pay to take a lease on it?

Q. Did you meet Colbert down there either of these times? A. No, sir.

Q. And have you been on that ground recently?

A. I was on it last Sunday.

Q. Did you find any other holes besides the one you saw there in the early days?

A. There are several holes sunk there now.

Q. Did you notice a hole that is now some 75 or 90 feet west of this first hole you have talked about?

A. Yes, sir.

Q. Did you go into that hole? A. Yes, sir.

Q. What did you find out about that hole—what did you see in there?

A. I didn't see anything of very particular interest in it. I see a vein or soft matter between a couple of harder walls on each side and some oxidized matter or wall, whatever you may call it.

Q. What was that lead matter there?

A. It was what I would call soft granite.

Q. Softer than the wall granite? A. Yes, sir.

Q. Did you take any samples out of that?

A. Yes.

Q. What did you do with them?

A. I took them to Mr. Hand and had them assayed.

Q. What have you done with that sample since?

A. I brought it over here and gave it to an assayer here.

Q. Did you get a certificate of assay from Mr. Hand?

A. Yes, sir.

Q. Who made the assay?

A. It was made in Carney & Hand's office.

Q. Was it made by Mr. Hand himself?

A. I don't think it was; I think it was made by a man working there; I don't remember his name; I don't know his name. I have a certificate here of the assay.

Q. Have you that certificate with you?

A. Yes, sir.

Q. Produce it—that certificate shows the result of that assay? A. Yes, sir.

Q. Read it—tell us what that assay shows.

A. Two ounces in silver and a trace in gold.

Q. And about copper, what does it show?

A. It says nothing on it.

Q. It don't say anything about copper?

A. No, sir.

Q. There was no copper found in the assay?

A. I suppose not.

Q. Was it assayed for copper?

A. I didn't give him any instructions what to assay for.

Q. But as to gold and silver, it carries 2 ounces of silver and a trace of gold? A. Yes, sir.

Q. With reference to the character of the sample that you picked, what do you say?

A. I picked what I thought was the best looking stuff that was there.

Q. The best you could find?

A. The best according to my judgment.

Q. That was in what hole? A. The hole C.

Q. And what part of the hole was it?

A. I picked it from both ends of the property, about 8 feet deep; I picked it about 7 inches wide, the width of my hand.

Q. What is the assayer's name in town you gave that sample to this morning?

A. I don't remember; it is right over there, near the hotel.

Q. Braden's assay office?

A. I believe that is the name.

Q. Do you know what was the price of copper at the mills or smelters or anywhere else where copper ores could be sold in 1878?

A. The winter of 1876 or '77 I and Brown had a lease on the Green Mountain there and Poznanski was working on an option there on some ground; and there was a man working for the First National Bank there, and I believe he told me that he would buy ore after it got to be 30 per cent; I don't remember what he paid for 30 per cent ore, whether anything or not, but \$2.50 a unit from that up; 20 pounds of fine copper is considered a unit in purchasing ore.

Mr. Clark. We make the same objection as before.
Objection overruled. Exception noted.

Q. Was there any copper smelters or places where copper could be worked around Butte in those days, in 1878?

A. No, sir.

Q. What was done with this copper ore that was produced in Butte, if any was produced, in those years?

A. I don't know.

Q. Was it shipped? A. Yes, I suppose so.

Q. Was it shipped out of the State?

A. I don't know where it was shipped.

Q. You have done some placer mining?

A. Yes, sir.

Q. What would you say as to the comparative value of this ground in 1878, this ground that we have been calling the "Childe Harold," for placer purposes and for quartz purposes?

Mr. Clark. We make the same objection.

Objection overruled. Exception taken.

A. In those days I would think it probably more valuable for placer mining, the way I looked at it then.

Q. And you predicate your opinion upon the knowl-

edge that you gained by these visits that you made down there—these examinations? A. Yes, sir.

Q. Did you work on that ground subsequently?

A. No, sir.

Q. You didn't work any placer ground for Noyes and others?

A. I did; in later years I worked for a man named Hall.

Q. On this ground? A. No, up above there.

Q. Were there any mines of copper or other metals down in this flat in 1878?

A. Not that I know of.

Cross-Examination.

By *Mr. Clark.* Q. Any locations down there that you know of? A. No sir; not in that vicinity.

Q. None whatever? A. Not that I know of.

Q. You say there were no smelters in Butte in 1877 or '78 where copper could be treated? A. In 1877.

Q. In 1878 were there any? A. I don't think there was.

Q. You say ore that ran less than 30 per cent copper, copper ore, was not regarded as any account?

A. That is what the man from the First National Bank claimed—he couldn't buy anything less than 30 per cent.

Q. You heard Charley Colbert had a copper mine?

A. Yes, sir, and I went to take a look at it, and then I went afterwards to see about taking a lease on it.

Q. You were looking for a copper mine?

A. Yes, sir, in those days anything I could get hold of.

Q. Did you hear how much per cent the ore in Charley Colbert's copper mine carried? A. No.

Q. In this hole C you saw the other day, about how wide was this seam matter? What do you call it?

A. I call it rotten granite.

Q. About how wide was it?

A. It was about 30 inches.

Q. What was the casing? A. Granite.

Q. Granite on each side? A. Yes, sir.

Q. You said in 1877 you went down along this country down on the flat looking for quartz prospects?

A. Yes, sir.

Q. You say when you heard that Colbert had a copper mine, you went down to see it and saw green ore there? A. Yes, sir.

Q. What does that green color indicate to you?

A. It indicates copper, and also lead and zinc and iron makes a green stain as far as I know.

Q. In your knowledge does ore of that color sometimes carry silver as well? A. Yes, sir.

Q. You went all over the flat pretty carefully in 1877?

A. Yes, up to 1878.

Q. Isn't it a fact that this is about the only one you saw, the one that Colbert had—of green ore?

A. Yes, about the only one I ever saw; I think it is the only one.

Q. You said there were 7 inches on the foot wall in this hole C of oxides of iron or ore matter, whatever you call it? A. Yes, sir.

Q. Then there was ore matter in that hole C?

A. It was soft granite, such as lays between harder walls!

Q. Did you see these harder walls on both sides?

A. Yes.

Q. And about 30 inches wide?

A. Yes, about 30 inches.

Albert W. Nodding, a witness called in behalf of the plaintiff, in rebuttal, being first fully sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you live?

A. Butte City.

Q. How long have you lived there?

A. Since 1870.

Q. What is your business? A. Mining.

Q. What kind of mining?

A. Placer and quartz.

Q. To the south of Butte there is a valley or flat, isn't there? A. Yes, sir.

Q. Are you acquainted with the ground in controversy, known as the "Childe Harold" location, situated near the Montana Central track? A. Yes, sir.

Q. When did you first become acquainted with that ground?

A. Personally acquainted with it first, that is to have any knowledge of it, was 1886; I knew the ground before that; I have known the ground since 1873.

Q. You worked on that ground, did you not, in 1886? A. Yes, sir.

Q. What kind of work did you do there in 1886?

A. Placer mining.

Q. For whom? A. Mr. Noyes.

Q. Look at that map there—can you tell me what part of that ground you worked on there and what you did? A. This is the east line of the Noyes placer.

Q. Yes.

A. Does this represent the cut east?

Q. It represents a ditch.

A. I helped to run that in the spring of 1886; we put in a flume to work a piece of ground up here.

Q. In running that cut or ditch, was your attention called to any shafts, or holes, or excavations in that vicinity?

A. My attention was not called, but there was a hole east of this cut, how far I can't say.

Q. Can you designate on the map where that hole was? A. I should judge about there.

Q. Were there any other holes in that immediate vicinity? A. West of that there was.

Q. How much of a hole was there to the west and how far to the west was it?

A. I should judge it was—not measuring, but practically speaking—I should judge it was about 75 or 80 feet.

Q. How large a hole was that in 1886, how deep?

A. It was about 2 feet.

Q. Did you examine either of those two holes with the view of ascertaining what was exposed by them?

A. Only the hole west: I examined that.

Q. When? A. In the spring of 1886.

Q. That two-foot deep hole? A. Yes, sir.

Q. You didn't examine the other then?

A. No, sir, I did not.

Q. What did you find in that hole to the west, the one you said was 2 feet deep?

A. Gravel and granite bedrock.

Q. That was placer ground in those days, the ground around there? A. Yes, sir.

Q. What in your opinion was the comparative value of that ground for placer purposes and for quartz purposes, the indications as exhibited by this hole?

Mr. Clark. We make the same objection.

Objection overruled. Exception taken.

Q. Which would it be better for, placer purposes or for quartz purposes? A. For placer.

Q. Have you been on that ground recently?

A. Yes, sir.

Q. Have you been able to identify that hole that was 2 feet deep in 1886; has it got any peculiarity about it now?

A. There is no peculiarity only in regard to distance.

Q. Is it deeper? A. It is deeper.

Q. Has it anything around it? A. A fence.

Q. That fence wasn't there in 1886?

A. No, sir.

Q. Did you go down into this hole lately?

A. Yes.

Q. When did you go down there?

A. I was down there a Saturday and a Monday morning.

Q. What did you see in that hole lately?

A. I saw a stain, considered quartz.

Q. Did you take any samples of that?

A. I didn't take any samples, but I saw samples taken from it.

Q. Who took that sample? A. Mr. Palmer.

Q. Did Mr. Palmer take a sample too? I forgot about that: who else took any sample? A. No one.

Q. Were you there with Mr. Brooner?

A. Yes, sir.

Q. Did he take any sample?

A. No, sir, not that I saw.

Cross-Examination.

By *Mr. Clark*. Q. You have worked for John Noyes for a great many years? A. Yes, sir.

Q. How many years?

A. I can't say; I commenced to work for Mr. Noyes in 1872.

Q. You say when you saw this hole in 1886, this hole to the west, it was only about two feet deep?

A. Yes.

Q. There was gravel in it? A. Yes, sir.

Q. The country to the north of that is placer ground?

A. Yes, sir.

Q. It has been since 1877 or '78 worked a great deal for placer, more or less? A. Yes, sir.

Q. And to work it for placer, they have run in ditches there for water? A. Yes, sir.

Q. And in building the railroad they have filled in there somewhat? A. Yes, sir.

Q. Have you any knowledge of how deep this west hole was prior to 1886—say in 1877 or '78?

A. I can't say it was any deeper in 1877 or 1878.

Q. How many times did you see it in 1877?

A. I couldn't say.

Q. What time in the year, in 1877, did you see that west hole?

A. From April to the first of August, 1877.

Q. You saw that same hole? A. Yes, sir.

Q. How many times did you see it in 1878?

A. I couldn't say.

Q. Could you say whether you saw it there in the first part of the year 1878 or not, in the spring?

A. Yes.

Q. And you say the other day when you went down there, it is deeper than it ever was before, and you saw a quartz stain in it? A. Yes, sir.

Q. What is quartz stain?

A. What I call quartz stain; I am not a quartz expert.

Q. What is quartz stain, as you understand it?

A. A stain in different colors from other rocks.

Q. In the immediate vicinity of it?

A. From the country rock.

Q. What was the color of this that you found in this hole the other day? A. A brown.

Q. How wide was that brown color?

A. I think it was about 4 or 5 inches.

Q. And what was the color of the rock on each side of it?

A. It was—I can't exactly remember the color of the rock.

Q. Do you remember what kind of rock it was on each side of it?

A. I should call it a stained granite.

Q. Do you remember whether this seam, or 6, 7 or 8 inches of brown quartz as you call it, what its direction was—whether it was perpendicular or slanting?

A. I should judge it was about perpendicular.

Q. And you judge of its direction, do you not, by this rock enclosing it on both sides, the line of that rock?

A. Yes, sir.

Q. You say you helped to excavate that ditch that ran through there, east of the 'Childe Harold' premises, in 1886?

A. Yes, sir.

Q. Did you conduct water through it after you got it dug?

A. I put a flume in it.

Q. Did you dig it down to bedrock?

A. Yes, sir.

Q. You noticed what—lead matter? Lead matter is what miners call vein matter, or lead matter?

A. Yes.

Q. Do you know what croppings are?

A. Yes, sir.

Q. When you got down to bedrock running that ditch, did you at any point notice any croppings or vein matter?

Question withdrawn.

Q. From your understanding of the phrase as a miner, what is the material that usually composes a vein, is it granite, or quartz: what would you call it?

A. I don't quite understand the question.

Q. What do miners usually call the material which occurs in a vein or lode; is it quartz or granite or any other kind of rock?

A. It is quartz or anything that would have an assay value.

— — —

David C. Bronner, a witness called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows: :

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. In Butte.

Q. How long have you lived there?

A. Since 1875.

Q. What is your business? A. Mining.

Q. What kind of mining?

A. Quartz and placer.

Q. How long have you been engaged in the business?

A. Since 1859.

Q. Do you know the ground in controversy in this action, that we have been calling the "Childe Harold" and which is situated near the Montana Central tracks near Butte?

A. Yes, sir, I knew it by that name for the last few days.

Q. Have you known that ground prior to the last few days? A. Yes, sir.

Q. When did you first become acquainted with that ground? A. 1885.

Q. What were you doing there in 1885?

A. Placer mining.

Q. For whom? A. Charley Colbert.

Q. What kind of work did you do there in 1885?

A. We ran a cut there, and put in a flume, and worked down to bedrock.

Q. Can you designate on that map where that placer mining work was done by you in 1885?

A. I think I can. We started in here somewhere, and placer mined from there up.

Q. How long did you work on that ground there?

A. Something near four years.

Q. Did you notice any holes or excavations around there outside of placer work?

A. No, sir, I did not.

Q. You don't know what is called the discovery of the "Childe Harold," or didn't know it in those days?

A. No, sir, I never saw it until last Friday.

Q. You have been there recently?

A. Yes, sir, last Friday.

Q. Can you tell us what part of that ground you went and with whom you went?

A. With Mr. Norton, and Mr. Palmer, and Mr. Moffitt.

Q. What part of the ground did you go on?

A. We went to this ground with the fence around it.

Q. That same hole on the other map is designated as C? A. Yes, sir.

Q. What did you see in that hole from a mining standpoint, in the hole C?

A. I saw some decomposed stained granite, I should call it.

Q. What would that indicate, if anything, that decomposed granite?

A. It indicates a softer vein of granite than the general run of the country rock.

Q. Would you call that quartz you saw in that hole?

A. No, sir; there might be a little quartz in it occasionally, a piece now and then, but very little.

Q. Did you sample that in any way?

A. Mr. Palmer took a sample of it.

Q. Did you see Mr. Palmer take the sample?

A. Yes.

Q. Did you help him take it? A. No, sir.

Q. Do you know what Mr. Palmer did with the sample? A. He took it and had it assayed.

Q. Do you know that of your own knowledge?

A. Yes, sir, I went with him to the assay office.

Q. Did you get a certificate of that assay?

A. He did, he has got it.

Q. Has Mr. Palmer got that certificate?

A. Yes, sir.

Q. You don't remember what the certificate says, do you?

A. It was a trace in copper, a quarter of an ounce in silver and 5-100 in gold.

Mr. Clark. The evidence of the witness as to the result of the assay is objected to.

Mr. McIntire. It is too late to make the objection now.

By *The Court*. You should have made the objection when the question was asked.

Q. Were you residing in Butte in 1878?

A. Yes, sir.

Q. What can you say as to any copper mining in that camp, in Butte, in 1878?

A. There was mining done at what was called the Parrott, and on the Original and the Gagnon at that time.

Q. Were there any mines of any kind in those days to your knowledge down in this flat or valley, where the "Childe Harold" is located?

A. No, sir; not that I know of, only placer mines.

Q. Do you know what percentage of copper ore was worked in 1878 and subsequent to that year, up to the time of the coming of the railroad into Butte?

Mr. Clark. We make the same objection. Objection overruled. Exception taken.

A. I don't know what percentage they did have to have to ship ore, but I know there was no way of working it there. The ore that came out of the Gagnon—I was working on the Original at that time—I know it was very rich ore, both in copper and silver and that was shipped East somewhere. The Gagnon carried both copper and silver and the Original also.

Q. Do you remember the percentages of silver and copper in those ore? A. No, sir.

Q. You don't know what was the least valuable copper ore that would be valuable in Butte in those days? A. No, sir.

Q. What assayer in Butte was that sample given to?

A. Max Lamar.

Q. What in your opinion would have been in 1878 the comparative value of what we call the "Childe Harold" ground now, for placer purposes and for quartz purposes?

Mr. Clark. Same objection. Objection overruled. Exception taken.

Q. For which purpose would it be the more valuable?

A. I wasn't acquainted with the ground at that time, until 1885, but in 1885, I would have taken it for placer ground.

Q. And not for quartz? A. No, sir.

Q. It was more valuable then in 1885 for placer than for quartz?

A. Yes, that is the first time I knew the ground and at that time, I would have taken it for placer ground.

Q. While you were running this ditch or excavation, did you notice this hole which you were down in the other day, the C hole? A. No, sir.

Q. Was there any hole of 8 or 10 feet in depth so near to that place where you were working in those days?

A. No.

Q. If there had been, you would have noticed it!

A. Yes, sir, we made our boxes and rifles right there on the ground, close to where the hole is now.

Cross-Examination.

By *Mr. Clark.* Q. Have you any knowledge of whether they have worked this ground for placer since 1886; you say in 1885, in your judgment, this ground was more valuable for placer than quartz purposes?

A. Yes, sir.

Q. Have you any knowledge whether they have worked this for placer ground since 1885 or 1886?

A. I know they have worked it since 1885.

Q. To any extent for placer purposes?

A. Yes, they have worked there on that ground.

Q. On that very ground occupied by this "Childe Harold" claim?

A. I don't know as to that—that piece of ground just above it.

Q. You wouldn't say they have done any work on the "Childe Harold" claim? A. I wouldn't say.

Q. You say when you examined this C hole the other day there was a fence around it? A. Yes, sir.

Q. Do you swear positively that no such hole existed when you were doing this placer work on the premises?

A. Yes, sir, I would be willing to swear that hole was not there anyhow at that time, and I don't believe the ground was broke there at the time I made the boxes for the flume.

Q. Did you search around the vicinity where you were working to find out?

A. It was right there at the edge of the work.

Q. Isn't it possible it could have been covered by boards or timbers at that time?

A. The hole wasn't there: I am satisfied it wasn't there.

Q. That was in what year? A. 1885.

Q. You say there is some decomposed stained granite in this hole C? A. Yes.

Q. How much of a strata of this decomposed stained granite did you see?

A. It is about 25 or 30 inches of stained granite.

Q. What is the material that encloses it on both sides?

A. Granite.

Q. On both sides?

A. Yes, sir.

Q. What is the direction of this streak of decomposed matter, what is its dip?

A. Perpendicular.

Q. Goes down to the bedrock? Is the bedrock disclosed in this hole C?

A. It is in the bedrock.

Q. And extends to the bottom of the hole, this seam?

A. It does, but it kind of narrows up I think as it goes down.

Q. How much does it narrow up?

A. I didn't measure it.

Q. You can testify as to how wide it is at the bottom?

A. I couldn't say.

Q. It is stained granite?

A. Yes, sir.

Q. What is the color of the stain?

A. Brown.

Q. You say there might be quartz in it?

A. I could see a little piece of quartz occasionally.

Q. Might there not be more quartz in it below the water line?

A. I couldn't tell what might be.

Q. What causes this brown decomposed matter?

A. I think it is a soft granite; an iron stain is what I pronounce it.

Q. And what decomposes it?

A. Water.

Q. Does air have any effect on it?

A. Not that I know of; it is a natural seam of soft formation.

Q. That is, it is a seam of different formation from the granite that encloses it?

A. A superior formation.

Q. It has a different color? A. Yes.

Q. Have you had much experience in quartz mining?

A. Quite a bit.

Q. Do you know what a vein or lead is?

A. I know what a vein or lead is.

Q. Do you know what a stringer or off-shoot is?

A. I don't know that I know exactly what you might call a stringer; I never mined in any stringers or off-shoots.

Q. Do you know what it is as those terms are used among miners? A. No, I couldn't say.

Q. Do you know whether or not it is part of a vein? A. It must be a part of a vein if it pays.

Q. Couldn't it be a part of a vein that didn't pay?

A. It couldn't be a part of a vein that was paying.

John McClaggin, a witness, called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you live?

A. At Butte.

Q. How long have you lived there?

A. From 1875.

Q. What is your business?

A. Prospecting and mining is most of my business.

Q. What kind of mining? A. Quartz.

Q. Ever do any placer mining?

A. Yes, a placer miner since 1853.

Q. Are you acquainted with the ground in controversy in this action, that has been called the "Childe Harold"?

A. Yes, sir, I have been over the ground a good deal.

Q. Have you been on the ground lately?

A. I was on there on Monday, last Monday.

Q. Where is this ground situated with reference to the Montana Central Railroad?

A. Part of the ground I was on is situated southeast from the Montana Central depot.

Q. With reference to the surrounding country in which this ground is situated, what do you say as to its being hilly or flat?

A. It was rather flat down there, as to the rest of Butte.

Q. When you were on the ground last Monday, what part of the ground were you on, taking the lines of the "Childe Harold" as a point of designation?

A. I don't know it by name any more than I heard it here in court as to the name, but I was on the ground that is in controversy where this shaft is.

Q. Do you remember any holes or excavations you saw down there at that time? A. Yes, sir.

Q. Do you remember one with a fence around it?

A. Yes.

Q. You went into that hole?

A. Yes, took a sample out of it.

Q. What did you do with the sample?

A. Had it assayed.

Q. Where are the assay returns?

(Witness produces paper.)

Q. Who assayed it?

A. A man here in Helena; I don't know his name.

Q. Where did you take that sample from?

A. I took it out of that hole with the fence around it.

Q. How far down in the hole?

A. I should think about—it may have been 8 feet.

Q. What do you say with reference to the sample you took, as to its being a fair sample or not?

A. It was a fair sample out of that hole.

Q. You attempted to get a good sample?

A. I attempted to get the best I could pick out.

Q. Talking about that hole, what did you see in it?

A. I saw a small stringer there; what I call a stringer, about 6 inches wide—it may have been 8 inches.

Q. Did you notice what the dip was of that stringer?

A. I didn't notice particularly; I think it dipped a little south, very little

Q. From your experience as a miner, what would you call that stringer that you noticed there?

A. I don't know what I would call it, any more than a stringer running through placer ground.

Q. You know what quartz is? A. Yes, sir.

Q. Did you notice any quartz within the stringer you have spoken about?

A. I can't say I saw any quartz; I saw granite there, stained—different stains of it.

Q. Were you in Butte in the year 1878?

A. Yes, sir.

Q. With reference to this flat in which the "Childe Harold" is located, were there any mines working down there, quartz mines, in that year?

A. Not in that section; lower down on the flat there were quartz mines.

Q. How far from this place in controversy?

A. About half a mile, I guess—three-quarters.

Q. What would you say, predicating the question on the year 1878, as to the comparative value of what you saw in this hole down there and the surrounding country, of the ground for placer and for quartz purposes?

Mr. Clark. Same objection.

Objection overruled. Exception noted.

Q. For what would it be the more valuable, quartz mining or placer mining?

A. I should count it more valuable for placer mining than for quartz; I didn't see anything there at that time in quartz.

Q. There is nothing there now, is there?

A. I didn't see anything that would pay.

Q. There has been a mine or lead or location spoken about in this examination called the Belmont, do you know that?

A. Yes, sir.

Q. Located it yourself?

A. Yes, sir.

Q. With reference to this "Childe Harold" location, how far off is the Belmont?

A. I should think—I don't think quite a quarter of a mile; about maybe 6 or 800 feet.

Q. Do you remember the assay values of the ore on the Belmont at the time you located it?

A. Yes, sir, when I located it I got a good assay out of it; it was something over 100 ounces of silver.

Q. Get any copper?

A. I didn't assay for copper; there was copper in it; I never assayed for copper.

Q. Never had any assay for copper on it?

A. No, sir.

Q. What has become of that Belmont since you owned it?

A. I sold it to a man named Davis; he sold it to a man named Moffitt and some others.

Q. Do you know of any work being done on the Belmont since then, since the time you had it?

A. Yes, I guess there has been as much as \$50,000 worth of work on it since.

Q. Do you know whether that mine has ever been made to pay?

A. I never heard of any pay being taken out of it since I had it that I know of.

Q. In 1878, in the city of Butte, was there much copper mining going on?

A. No, sir, very little copper mining; copper had got down in price and they couldn't afford to work it; there was a mine called the Clark's mine, on the Parrott lead that was working.

Q. Do you know what percentage of copper, what per cent in ores of copper, would justify working in 1878, taking into consideration the condition of affairs, price of labor, materials, supplies, etc., in the city of Butte?

Mr. Clark. Same objection. Objection overruled. Exception taken.

A. I don't know anything about that.

Q. Are you acquainted with a lode in the vicinity of this "Childe Harold" known as the Ground Squirrel?

A. No more than knowing where it is; I have been all over that ground.

Q. How far from the "Childe Harold" is the Ground Squirrel? A. I should think it was half a mile.

Q. Are there any mines down in this flat now that are worked for copper, to your knowledge?

A. I couldn't say; I think there is some working down there, but I couldn't say.

Q. Read that sample certificate; what gold did that sample carry, what silver and what copper?

A. Gold a trace; silver \$3.00; copper 39-100 per cent.

Q. Is that silver \$3 or 3 ounces? A. 3 ounces.

Q. Copper you say a trace?

A. Copper .39 per cent.

Q. What is at the head of the column in which you see that; what was under the head of Silver?

A. Ounces of silver.

Q. And the figure 3 is under it?

A. Yes, sir; I suppose it is 3 ounces; it is a 3.

Cross-Examination.

By *Mr. Clark*. Q. You say you were on the ground last Monday? A. Yes.

Q. You took this sample from this hole with the fence around it? A. Yes, sir.

Q. About 8 feet down?

A. I should judge about 8 feet.

Q. And you saw in it granite stained with different colors? A. Yes, sir.

Q. What different colors?

A. A little green—very little—and some red stain.

Q. What did the presence of this green stain in ore or rock matter of any kind indicate to you as a miner?

A. The green stain is an indication of copper.

Q. What did this brown stuff indicate to you?

A. Sometimes it indicates silver and sometimes copper; you can't tell.

Q. You say there is a stringer there about 8 inches wide; will you explain what a stringer is?

A. A stringer is sometimes a stringer running from a ledge; sometimes there is a stringer in rock that doesn't connect with anything and runs out by sinking on it.

Q. And you can't tell which it may do?

A. No.

Q. What was the character of the casing on each side of this stringer 8 inches wide?

A. Loose granite.

Q. And was that granite in place?

A. It looked to me as though it was in place.

Q. And did this stringer 8 inches wide show in this hole down to the bottom, or did you notice that?

A. It showed down to the bottom; yes, I think it did.

Q. And how near to the surface did it come?

A. It went all the way to the surface, I think.

Q. Did you measure it all the way down?

A. No, sir.

Q. Do you swear it was 8 inches wide all the way down, or did it vary?

A. I should think about 6 or 8 inches.

Q. You say the Belmont mine in this vicinity, when you located it, assayed 100 ounces in silver to the ton?

A. Yes, that was the first assay I got out of it.

Q. That to the best of your knowledge \$50,000, or more, has been spent there since? A. Yes.

Q. And, to the best of your opinion, it has not paid?

A. Not that I ever heard of.

Q. If this vein which you located on the Belmont would carry 100 ounces of silver when you had it assayed—was that at the surface, that assay?

A. Yes, it was from the surface where I got it.

Q. If that vein, when followed by the various parties who have worked on it since you owned it, had carried 100 ounces to the ton right through, as your assay showed it carried at the surface, do you mean to say it would not have paid the expense of exploitation?

A. There was only a small stringer that this ore was on, after they went down on the main ledge. It was a stringer running into the main ledge, and after they went down on the main ledge, they couldn't get anything.

Q. And you understand that going down on this stringer, they did strike a ledge?

A. They didn't go down on the stringer; they hunted for the stringer, but never got any pay out of it.

Q. How did they locate the ledge---from following the stringer?

A. That showed plainly, without going to the stringer at all.

Q. Then all they had at the surface was this stringer you speak of?

A. They had the main ledge at the surface. I was myself on the main ledge; I had mined at it, but never got anything out of it, and lost it.

Q. How long did you hold it?

A. From the fall of 1876 until '81 or '82.

Q. And you never made any money out of it?

A. No, sir.

Q. And you lost it to other parties; it wouldn't pay?

A. Yes, sir, I lost it to other parties.

Q. Do you know whether or not that same Belmont mine, on which you say this large sum of money has been spent, is to-day a patented mine?

A. Yes, it is.

Q. Are you able to tell from what you saw of this 8 inch wide stringer and in this hole C, that that stringer might not lead to a ledge or vein in that ground, if followed?

A. It is hard to tell; I have followed a stringer like that and it would give out, and sometimes they lead into a ledge, and you may have to go a great distance to get to the ledge.

Q. You can't tell whether it would run out or run into a ledge? A. No.

Q. From what you saw in that hole the other day?

A. No.

Q. Did you ever own any placer ground in Butte where Broadway is now? Did you ever know of any

placer ground in Butte covering the territory through which West Broadway runs now, beyond Missoula gulch?

A. I owned ground there myself, a quarter interest in 1600 feet long and 600 feet wide.

Q. You had a quartz claim there?

A. Yes, sir.

Q. And your quartz claim was on ground previously located as placer ground?

A. No, it was not located, because it was taken up before the placer ground was abandoned.

Q. But you had some litigation with Mr. Bronner who claimed it as placer ground? A. Yes, sir.

Q. Do you remember what the result of that suit was?

Counsel for Plaintiff objects to the question. Objection sustained. Exception taken.

Redirect Examination.

By *Mr. McIntire*. Q. How far is this Broadway from the "Childe Harold" ground?

A. It must be I think half a mile.

Q. There is one question that has not been asked these various witnesses—In 1878 would it have justified under the circumstances then existing in the city of Butte, would it have justified the expenditure of time and money to have worked ore carrying three ounces of silver to the ton?

Counsel for defendants object to the question as calling for an opinion from the witness. Objection overruled. Exception taken.

Q. Would it have justified the expenditure of labor and money to have worked ores carrying 3 ounces of silver to the ton in the year 1878?

A. No, sir, it would not.

Q. Now, repeating that question as to gold ores, would it have justified the expenditure of labor and money to have worked gold ores carrying one dollar to the ton in gold in Butte?

Same objection. Objection overruled. Exception taken.

A. It would not now.

Q. What do you say about the present condition of affairs with 3 ounces of silver in Butte?

Same objection. Objection overruled. Exception taken.

A. It would not pay.

Q. Do you know what the smelter charges are or were in Butte in 1878?

Same objection. Objection overruled. Exception taken.

A. They charged as high as \$60 to the ton for smelting charges. I don't think there was a smelter there in 1878.

Q. Those were milling charges; do you remember when the first smelter was put in up there?

A. The Colorado smelter.

Q. What year was that put up, do you know?

A. I think it was put up in—I couldn't tell exactly—I think 1873, though.

Q. Do you remember what the charges were for smelting purposes at that smelter in 1878?

A. I couldn't tell you.

Herebert Garjof, a witness called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. In Butte.

Q. How long have you lived there?

A. I went there first in 1877.

Q. And have been living permanently there since when?

A. Since last—beginning of last September.

Q. You are not an old timer in Butte?

A. Yes, I went to Butte first in 1877.

Q. How long did you live there then?

A. Until 1880.

Q. Are you acquainted with this ground that is in controversy in this suit that we have been calling the “Childe Harold”?

A. Only with that ground below where the “Childe Harold” is situated, what they call the “Childe Harold”—I never knew that name—but all below that ground was worked as placer ground in 1877, '78 and '79.

Q. Have you been on that ground recently, the ground we call the “Childe Harold”?

A. I was there last Friday and last Saturday.

Q. There is a hole on that ground with a fence around it?

A. Yes, sir.

Q. Did you pay any attention to that hole?

A. Yes, I went down in the hole.

Q. What has been your business?

A. I have been an engineer and miner and prospector and milling man.

Q. For how many years? A. Ever since 1877.

Q. What did you see down in that hole with the fence around it?

A. There is a kind of decomposed matter, a brownish matter there.

Q. What would you call that matter?

A. It looks to me more like an iron stain than anything else.

Q. You know what quartz is? A. Yes, sir.

Q. Did you see any quartz in that hole?

A. Some very small portions of quartz.

Q. Quartz in place or in pieces.

A. In pieces.

Q. What we call kidneys?

A. Yes, it was broken up quartz.

Q. How deep is that hole?

A. I should judge that hole to be about 9 or 10 feet deep.

Q. Did you have sufficient interest in it to take a sample of it? A. Yes, I took a sample.

Q. Where is the sample?

A. It is in my pocket. Here it is; it is crushed; it is what the assayer used.

Q. That is the pulp?

A. Yes, sir, it shows the general nature of the quartz.

Q. What kind of a sample is that with reference to its goodness?

A. That is an average sample, taken directly across the lode.

Q. At what depth is it taken?

A. It is taken from 8 to 9 feet, as close to the bottom almost as I could get.

Q. You had that assayed? A. Yes, sir.

Q. What side of the hole is it taken from?

A. The west side.

Q. You have your assay returns? A. Yes, sir.

Q. Where was the assay made?

A. Carney & Hand.

Q. Have you the assay returns here?

A. Yes, sir.

Q. Who made the assay, which of the assayers there?

A. Mr. Carney, I believe.

Q. Mr. Carney here in town?

A. No, in Butte.

Q. Did you have it assayed for copper?

A. Only for silver and gold.

Q. Have you since had it assayed for copper?

A. No.

Q. How much did it carry in gold?

A. A trace.

Q. And silver?

A. 8-10 of an ounce, equal to probably about 50 cents.

Q. What would you call that indication down in that hole, in regard to its being a locatable vein?

A. I don't think I would want any of it, for my part.

Q. What would you say with reference to the condition of affairs in 1878, as to its being worth locating or not?

A. I don't think there was any man there at that time who would have looked at it.

Q. In the year 1878, in the city of Butte, do you know what copper ores were worked, ores carrying what percentage?

Mr. Clark. Same objection. Objection overruled. Exception taken.

A. I couldn't say exactly, only from one point, that I went over with a friend of mine, Mr. McConnell of Philipsburg, to examine a mine, with him and we brought in some rock and it went 27 per cent copper and they abandoned the mine right there.

Q. Wouldn't have a mine with 27 per cent copper?

A. No, sir.

Q. The difference in the price of materials and supplies, since the coming of the railroad, and prior to that time is quite material? A. Yes, sir.

Q. Were there any copper smelters in Butte at that time?

A. There was one; I don't know whether it was copper or not, but that was abandoned; that was directly north of Mr. Davis' mill.

Q. Have you ever done any placer mining?

A. Very little.

Cross-Examination.

By *Mr. Clark.* Q. You say that this gentleman gave you to understand, the gentleman you spoke of, that this location at Philipsburg assayed 27 per cent copper in 1877 or 1878?

A. I mean over on Pipestone, not Philipsburg.

Q. How far from Butte is that?

A. It is 16 miles where we were, across the flat, south.

Q. There were no smelters in Pipestone at that time?

A. No.

Q. So if they had taken out any of this 27 per cent copper ore to have it smelted they would have to have it transported by a team to Butte?

A. Yes, sir.

Q. You say you took this sample which you have exhibited from the face of the hole, the west wall of this hole C?

A. Yes, sir.

Q. You took off any particles all across the face of the hole?

A. Took a pick and picked across

Q. It wasn't in that form when you first found it in the hole?

A. Not as fine as that.

Q. What did you knock it off with?

A. With a pick.

Q. So that it was a good deal more solid than that when you first found it?

A. Yes, but still the ledge is decomposed to a certain extent.

Q. How wide is that streak of decomposed matter you found in that hole?

A. It is nearly all decomposed, all the way across; what I would call decomposed, because there is stringers; there is ground which is very much decomposed and then you will come to quartz and granite mixed; chunks of it.

Q. And you saw this in this hole, quartz and granite mixed?

A. Yes, sir.

Q. Didn't this decomposed matter come to an end on either side of that hole as far as you could see?

A. Certainly.

Q. On which side?

A. The wall, whatever you would call it, the wall or country rock is more solid on the south side than it is on the north.

Q. And what is that country rock on the south side?

A. Granite.

Q. On the other side, does this decomposed matter come to an end? A. Not exactly.

Q. What is the nature of the rock on the other side?

A. Granite.

Q. Is the granite in place? A. Yes, sir.

Q. Did you notice any other colors in this decomposed matter, across the face of this hole, other than the brown stain you have mentioned? A. No, sir.

Q. See any indication of any green stain?

A. No, sir.

Q. You call that iron stain? A. Yes, sir.

Q. You say in this stratum of decomposed matter, there were pieces of quartz? A. Yes, sir.

Q. Did those pieces of quartz occur as far as you could see in this decomposed matter for the full depth of the hole? A. No, sir.

Q. How far down did you notice these pieces of quartz?

A. I didn't prospect from the top to the bottom, only at the bottom.

Q. You didn't notice these pieces of quartz at the bottom? A. Yes, sir.

Q. What was the material surrounding them?

A. This decomposed matter and granite.

Q. And these pieces of quartz of which you speak, you didn't find at the bottom of the hole detached?

A. I had to pick them out as I went along, along the ledge.

Q. You picked them off the face of the hole?

A. Yes, sir.

Q. Did you in taking this sample, pick out any of those pieces of quartz? A. No.

Q. You took this sample from the matter surrounding these pieces of quartz?

A. I took the thing as it came right along.

Q. You say there were detached pieces of quartz in the face of the hole?

A. They would naturally come out as I was picking them and I picked them up.

Q. Did you put them into the sample you had assayed, those detached pieces of quartz?

A. Yes, sir.

Q. In sampling a vein or ledge as a miner what do you say, do they usually in attempting to take a good sample for assay or in taking the best sample they can find for assay, don't they usually take out the pieces of quartz in finding them?

A. If a man wanted to flatter himself, he would, but if he was going to work the mine for his own benefit, to find out what was there before spending money, he would want to know the full width of the vein.

Q. When miners exploit a vein, in taking out what

they consider pay ore, do they always take out the whole width of the vein, everything they find there in it?

A. Do you mean for working purposes?

Q. Yes.

A. Certainly, the ore is assorted afterwards.

Q. Then they do assort it? A. Certainly.

Q. And they don't send everything they take out to the smelter? A. Unless it will pay to send it.

Q. And when they take out vein matter in mining they always sort it before they send it the smelter?

A. Certainly.

Q. And when they sort it, they pick out the best pieces to send to the smelter? A. Certainly.

Q. What is the width of that hole; you say the decomposed matter extended clear across it?

A. It was between 2 feet 6, and 3 feet.

Q. And you say you saw this granite in place on both sides of it? A. Yes, sir.

Redirect Examination.

By *Mr. McIntire*. Q. You would practically have to reject all the ledge matter to get paying ore out of that thing? A. Mighty near it.

William F. Cobban, a witness called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. Butte.

Q. What is your business? A. Real estate.

Q. How long have you resided in Butte?

A. Since the fall of 1881.

Q. Are you acquainted with what is called the Noyes & Upton Railroad Addition to the city of Butte?

A. Yes, sir.

Q. This is down near the Montana Central Railroad?

A. Yes, sir.

Q. Do you know the ground in controversy, called the "Childe Harold"?

A. Yes, sir.

Q. That is within the limits of that addition, or somewhere near it?

A. Somewhere near it; it doesn't touch that addition, not but a very little of it, anyway.

Q. Were you around that ground at all in the year 1881 when you first went there?

A. Some, but mostly in 1882.

Q. Had that ground at that time any value for surface purposes, for town lot purposes, in 1882?

A. Yes, sir.

Counsel for defendant's object to above question and answer on the ground that the evidence is incompetent and immaterial, so far as it concerns any issues raised in this action. Objection overruled. Exception taken.

Q. What do you say as to the surface value of that ground in 1882?

A. It was valuable.

Q. What would it be worth per acre, do you remember; had you any knowledge of the value of it?

A. Yes, I think I paid at the rate of about \$500 per acre for what I got.

Q. That was in the vicinity of this "Childe Harold"?

A. Yes, south of that a little way.

Q. Even further away from town than the "Childe Harold"?

A. Yes, nearer South Butte.

Q. Are you acquainted with the location known as the Ground Squirrel, near the "Childe Harold"?

A. Yes, sir.

Q. Do you know the value of that ground around there at that time or later?

A. In 1884 that ground was offered to me at \$35 per lot.

Q. It was platted then? A. Yes, sir.

Q. How many lots to the acre?

A. About 9 lots.

Cross-Examination.

By *Mr. Clark.* Q. Do you know Mr. John Noyes?

A. Yes, sir.

Q. Are you not now and have you not been associated with him for a considerable length of time?

A. No, sir.

Q. Have you had any interest with Mr. John Noyes in business enterprises?

A. We had an interest—I say no—we have an interest in Application 717.

Q. A placer application? A. Yes, sir.

Q. Where is that located with reference to this ground in dispute?

A. I should judge a quarter of a mile west.

Q. You and Mr. Noyes had a placer application?

A. I know had a small interest in it.

Q. Is it patented as placer? A. Yes, sir.

Thomas J. Moffitt, a witness called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. Butte City.

Q. What is your occupation? A. Mining.

Q. How long have you lived in Butte, and how long have you been a miner?

A. I have been a miner since 1866; I have lived in Butte this last time since 1884.

Q. Had you lived there prior to that time?

A. I lived there in 1867.

Q. Were you living there in the year 1878 or around that? A. No, sir.

Q. You are acquainted with that flat to the south of Butte, over which the Montana Central runs?

A. Yes, sir.

Q. Do you know a certain location down there which we have been designating as the "Childe Harold"?

A. It has been pointed out to me—yes, sir.

Q. And your knowledge of the ground has been for how long?

A. My first knowledge of the ground was this last winter. I helped Mr. Wilson to cut the boundaries of it.

Q. Have you been on the ground since last winter?

A. Yes, several times.

Q. With whom?

A. I was there with Mr. Hand on three or four occasions.

Q. Did you examine some holes down there?

A. Yes, sir.

Q. Assisted Mr. Hand, did you not?

A. Yes, sir.

Q. Do you know what we have been designating as the discovery shaft of the "Childe Harold," marked A on the plat?

A. Yes, sir.

Q. Have you been in that hole?

A. I have.

Q. Did you remove the lagging there?

A. Yes, sir.

Q. With Mr. Hand?

A. Yes, sir.

Q. How deep down in that hole did you go?

A. I should judge somewhere in the neighborhood of 20 or 25 feet, I don't just remember now; I didn't take the dimensions.

Q. In that hole there appears to be some green stain or green looking stuff?

A. Yes, sir.

Q. On what side of the hole?

A. My observation is, it is principally on the east side.

Q. A short distance from that hole, to the east, there is another shaft?

A. There are several shafts.

Q. One particularly that has a frame around it?

A. Yes.

Q. Is that marked on that map?

A. It is marked on this lower map.

By *Mr. Clark*. Is this shaft within the limits of this claim?

A. This gallows frame is some 50 or 60 feet off the claim.

Q. Is there any hole around that gallows frame?

Counsel for defendants object to the question as not proper rebuttal, the frame referred to not being on the land involved in this action.

The Court sustained the objection, not on the grounds stated by counsel, but because it would open up an examination that would lead to new testimony, further rebuttal by defendants, etc.

Mr. McIntire. We will note exception.

Q. Confining yourself then to what we call the discovery shaft of the "Childe Harold," I think you said that this stained stuff, this green stuff, is found most generally on the east side? A. Yes, sir.

Q. Did you examine any other holes on the ground in controversy? A. Yes, sir.

Q. Did you examine one that has been designated on that tracing as C and has a fence around it?

A. Yes, sir.

Q. When did you go into that hole and examine it?

A. I couldn't say the date I went in there, as I have been there several times.

Q. What kind of a hole is that—how deep?

A. I should judge 8 or 9 feet deep.

Q. Did you go down in that hole? A. Yes, sir.

Q. Did you notice the appearance of that hole?

A. I did.

Q. Did you see anything which in your judgment as a miner would indicate the presence of a lead?

A. I seen what would indicate a soft substance, brownish, that a miner might take a sample of to assay.

Q. And what, in your opinion, was that soft stuff you saw?

A. From my observations it was granite; I did see some very small pieces of green stuff about the size of a pea occasionally, one or two.

Q. And those pieces might be what?

A. They might be copper or might be vegetation, for all I know.

Q. With reference to that hole, designated on that tracing as A and which we have called the discovery shaft of the "Childe Harold," how does the hole marked C compare with it?

A. There is no comparison whatever.

Q. From what you saw in this hole marked C, would you say from your knowledge and experience as a miner, that there was a locatable quartz lead there?

A. On the discovery or on C?

Q. On that hole with the fence around it, marked C.

A. No, sir.

Q. You are acquainted with a vein or location in the neighborhood of the "Childe Harold," known as the Beluont?

A. Yes, sir.

Q. You have worked on that?

A. Yes, sir.

Q. Do you know what the assay values of the ore from that mine were when it was first struck?

A. I shipped ore from there, taken out from towards the surface, that went over 20 per cent copper.

Q. When did you ship that?

A. In 1886.

Q. And what was the result of those shipments?

A. I got some pay out of them.

Q. In 1886, with 20 per cent copper?

A. Yes, sir.

Q. Did you get anything else out of that ore in the Belmont? A. No, sir.

Q. Any other metal in the ore besides copper?

A. Nothing to speak of; we sunk a shaft in 1886, 50 feet deep and cross-cut it in different directions.

Q. Do you know what it assayed in silver, the ore from the Belmont?

A. No, sir, I don't now, not that particular class of ore; I didn't make any note of it.

Cross-Examination.

By *Mr. Clark.* Q. This was from the Belmont that you say assayed 20 per cent copper: do you know from what point it was taken? A. From the discovery.

Q. How far from the surface?

A. A few feet. There was a level run there at 50 feet—40 or 50 feet.

Q. You think it was taken down at a depth of 40 to 50 feet?

A. We worked that level afterwards and couldn't find anything.

Q. Do you know how far from the surface this 20 per cent copper was taken?

A. It came from near the surface, probably 30 feet—30 feet from the surface down; it was laying on the dump.

Q. As far as you know, none of this ore from the Belmont mine ever assayed any gold and silver?

A. I don't know whether it did or not; I didn't make any note of it at the time.

Q. In this hole C you say you saw some small particles, green stained? A. Yes, sir.

Q. At what depth did you see those green particles?

A. Five or six feet, probably.

Q. Was it above or below the bedrock you saw it?

A. Above the bottom of the hole.

Q. Do you know whether it was below the surface of the bedrock or not? A. I should think it was.

Q. You say this may have been vegetation?

A. It might possibly be.

Q. This C discovery shaft is a square hole in the ground?

A. I don't know what shape it is—funnel shape.

Q. How long will this green stain, that might be produced by vegetation, exist under ground, in bedrock?

A. I don't know.

Q. Do you know whether or not that vegetation, imbedded in rock for one year, would show that green stain?

A. It might, yes. I made an assay the other day of stuff I took to be malachite of copper, that I didn't get a trace; I suppose it was vegetation.

Q. Have you any idea how that vegetation got down to bedrock? A. No, sir.

Q. Do you regard that as a queer place to find vegetation in?

A. No; roots will go down a vein quite a distance, roots of vegetation growing on the surface.

Q. Grass roots?

A. Not grass roots particularly — sagebrush and weeds of different kinds that grow upon the top of the ground.

Q. How deep has this been where you saw the green spots, from the surface, the top of the soil?

A. I didn't take any measure, 3 or 4 or 5 feet—I don't say 5—3 or 4 or 5.

Q. And how deep below the bedrock, the surface of the bedrock?

A. A foot and a half or 2 feet of soil on the bedrock.

Q. Does sagebrush grow on this ground?

A. It has; I don't know that it does now.

Q. Was there any sagebrush the last time you visited it? A. There were weeds there.

Q. Is it the result of your experience that the roots of weeds grow down below bedrock a foot and a half?

A. I haven't seen them grow.

Q. You don't remember whether there were any weeds the last time you were there?

A. I can't say there were weeds to any extent.

Q. What was the general appearance of the matter in this hole C? A. A sort of a brownish color.

Q. What does that brownish color indicate to you?

A. An oxide of iron, probably, I should judge by looking at it.

Q. Can you tell whether or not it shows the result of the process of decomposition?

A. Yes, sir, it shows it has been decomposed.

Q. How wide is this decomposed streak in that hole?

A. The whole matter is stained to a certain degree somewhat, more or less; there is a little piece from what

might be termed the footwall for 6 or 8 inches more decomposed than the rest.

Q. Why do you call it a footwall if it is decomposed?

A. We call all walls where there is an inclined formation, the hanging wall, a wall you would come on to; it is all granite, this wall.

Q. In place? A. It is all jumbled up.

Q. There is enough difference between this decomposed matter and the footwall to indicate the dip of the decomposed matter?

A. If there was any dip it was to the south.

Q. Did you see a wall on the other side?

A. I saw granite there, which might be termed a wall.

A. In shaft A you say the evidence of ore that you saw, vein matter, was on the west side—that is the green ore?

A. It was principally on the east side, I said.

Q. Any of it on the west side?

A. There was some green ore on the west side.

Q. How wide was this matter in hole A, the first hole?

A. I think from what I would judge, it was somewhere near 30 inches, as near as I can recollect; that is, the whole vein, what you might call the vein.

Q. There is no comparison between the materials in those two holes you say?

A. None whatever, in my judgment.

Q. Was the difference this, that in hole A there was green matter and hard solid rock and in hole C it was decomposed?

A. It was different decomposition from what would occur in the other hole; there was quartz in A hole and I didn't see any quartz coming out of C hole.

Q. Did you make an examination to see?

A. Well, I examined it pretty carefully.

Q. You didn't see any small detached pieces?

A. Not to my knowledge I didn't; I didn't happen to run across any of them.

Q. You think from what you saw in hole C, a miner might take a sample for assay?

A. A man will take a sample where he sees brown stuff; he thinks he might get a pay sample.

Q. Just because he saw the brown stuff?

A. Yes, sir.

Q. What does the brown stuff indicate?

A. It might indicate there was a lead close by there.



Carl H. Hand, a witness called in behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

By *Mr. McIntire*. Q. Where do you reside?

A. Butte City.

Q. How long have you resided there?

A. Since June 1, '86.

Q. What is your business?

A. I am a member of the assay firm of Carney & Hand; my partner Mr. Carney attends to the assay office business and I am around on the outside examin-

ing mines and making mining reports for myself or for investors.

Q. What experience have you had in the business of examining mines and making reports on the same?

A. I received a technical education at the Golden School of Mines and left there about 1881 or '82; since then I have been constantly engaged either in assaying or examining mines.

Q. What experience have you had in the assaying of ore?

A. I am a practical assayer; I was instructed in the Golden School of Mines.

Q. And have had experience in assaying?

A. Yes, sir.

Q. You are acquainted with the ground in controversy in this action that we have been calling the "Childe Harold" claim?

A. Yes, sir.

Q. Have you made visits to that ground?

A. Yes, several times.

Q. At whose request?

A. At the request of Mr. McIntire and Mr. Shores.

Q. And from those requests, have you made an examination of that ground?

A. As thoroughly as possible.

Q. Do you know a certain hole down there designated as the discovery shaft in the "Childe Harold"?

A. Yes, sir.

Q. It is designated on that tracing up there as A, is it not?

A. Yes, sir.

Q. With reference to that hole, I will ask you

whether or not there is not a fence to the left of it or to the west of it?

A. Yes, sir, something over 100 feet to the west there is a shallow hole; there is a fence about 20 feet off to the west, or 15 feet.

Q. Do you know what mine that fence is on?

A. As I have been told, it is on the ground of the John Noyes placer.

Q. Did we not ourselves run a line over from two corners to the "Childe Harold" when we were there?

A. Yes, from corner number 3 down to corner number 2.

Q. Coming back to that hole A, how many times have you been in that hole?

A. I can't say exactly, four or five times.

Q. What was the condition when you first went into it?

A. When I first examined the A hole it was timbered from the top to the bottom; it was then at a depth of 25 feet. The bottom was filled with ice. There was water underneath and the water had frozen. There was a little excavation, a portion of the same hole, just to the east of it, perhaps 4 or 5 feet east. Subsequently I had the lagging removed partially at both ends of the shaft. Mr. Moffitt assisted, and I then took samples as well as possible. Before I get into the shaft, I would like to make a short statement in regard to the geology and appearance of the veins on the surface, especially in the copper section of Butte. The country rock of Butte is rather a homogeneous grey granite, and the copper veins as they come to the surface show generally quartz

stained red with iron, and almost without exception carry fair quantities of silver, and a great many veins carry workable quantities as they get deeper: the sulphide ore generally appear on the copper veins. The veins toward the surface are soft and decomposed—frequently the walls are so decomposed that it is difficult to distinguish between the country rock and the walls.

Q. Now, with reference to the A hole; from what side of the hole did you take those samples?

A. I took them from both sides.

Q. Now beginning on the east side of that hole, and marking your samples as you have them?

A. I have got them down somewhat irregularly.

Q. You can't begin on either side then particularly?

A. No, not particularly—here is sample number 1.

Q. Tell us where the samples were taken, and the result of the assays of them?

A. Sample No. 1 came from the east end of the shaft, a width of about three feet. It came from a point 14 feet down from the collar of the shaft; that would be taking the level of the bedrock down about 9 feet below; the level of the bedrock is exposed on the east side of the shaft, the present bedrock that shows there; that assayed 5.5 per cent copper, 1.8 ounces silver, and a trace in gold. I will say that a trace in gold practically means anything under 40 cents, about 40 cents, something of that kind, somewheres around there: number 2 was a sample—I will skip number 2 now: number 3 came from the west end of the shaft, from a width of about 3 feet, 19 feet down. It assayed 5.6 per cent

copper, 2.3 ounces silver, and a trace in gold. Number 4 came from the east end, 2 feet wide, 6 inches next to the footwall, looks rather better than the balance; that was in the same side, right opposite number 3; 7 per cent copper, 1.7 ounces silver, and a trace in gold; number 2 came from opposite number 1, and was for a width of about 2 feet, and there was a little more in the footwall of the shaft that I couldn't get to sample on account of the position of the timbers. That was 7.5 per cent copper, 1.2 ounces silver, and a trace of gold. Number 3 was 13 inches alongside of and south of number 4, depth 19 feet; it ran 4.10 of an ounce in silver, 5.10 per cent copper, and a trace in gold; number 6, going then out of the shaft and into the inclined portion of the excavation to the east and near the surface, I took sample number 6. This was about 2½ feet below the surface of the bed-rock. It was a 2-inch streak in the east end of the shaft. It ran 2.4 per cent copper; 0.4 ounces of silver, and a trace in gold. It was a narrow streak; it was the best-looking portion of the vein there that I could see.

Number 7 was selected rock, some pieces that looked well, as good as I could see and as good as I could find. It came from the same place as the average samples number 3 and 4. It assayed 11.7 per cent copper, 0.4 ounces silver and a trace in gold. That was the best rock I could break out of the streaks.

Number 8 was an average sample of 10 inches on the west end of the discovery shaft, about 10 feet from the collar of the shaft. Its average was 6.6 per cent copper, 3.1 ounces silver and a trace in gold.

Number 9 was a select piece of rock from the same place, about 10 feet down on the west end of the shaft, about 10 feet down in the shaft. I selected this because it showed rather more quartz and it was porous and looked as if its principal value might be gold or silver, if there was any gold or silver there. It assayed 4.8 per cent copper, 2.8 ounces silver and a trace in gold. These are all the samples that I took from this shaft, with the exception of a couple of samples that I have here and have not assayed. This sample is marked number 1B; it comes from the discovery shaft, east end, 9 feet deep below the bedrock, $2\frac{1}{2}$ feet wide, being in two streaks separated by about a foot of granitic rock, that is on the east end. I haven't assayed this sample, but it will assay very similar to sample number 2. It is from the same place, about one foot higher up, just as close under the timber as I could get it. Number 2B is a sample of the granitic material lying between the streaks. It is a soft granite, slightly stained with a little copper and other mineral, the copper stain coming presumably from the copper ore running on either side; vein granite.

Q. Do I understand you to say vein granite?

A. Yes, sir, vein granite.

Q. When did you take these two samples out?

A. Last night. They are both as fair samples as I could get. That sample would probably run anywhere from 5 to 7 per cent copper, and less than 2 ounces of silver, or in the neighborhood of 2 ounces.

Q. About the same as sample number 2?

A. No, I made a mistake; I told you sample number 2 came from the west end. It would be about the same

as sample number 1—assay value about the same as sample number 1. It was taken about a foot above sample number 1.

Q. Now on the west side of that shaft—compare it with the east side—where was most of this stuff to be found?

A. It looked rather better on the east side; there is some copper ore, though, on the west side, but down in the bottom. I wish to say that in the bottom of the shaft, at a depth perhaps of 20 feet from the collar of the shaft, the copper streaks seem to be narrower; it is not more than 4 or 5 inches in width with a little quartz mixed outside of it, but eventually the ore is pinched up there; but on the west side, at a corresponding depth, the lagging has not been removed quite to the water: about 3 feet above the water and in back of the lagging on the end of the shaft, there is a hollow space so you can see and examine the ledge and the copper there seems to be coming out of the vein, out of the ledge; it seems to be pinched up; it would look as if this copper was a bunch of copper ore in the vein.

Q. There is another hole on that ground to the west; we have been designating it as hole C: it has a fence around it; do you recall that hole? A. Yes, sir.

Q. Have you been in that hole?

A. Yes, sir, repeatedly.

Q. Describe to His Honor that hole and tell us what you saw there?

A. It is a hole perhaps 7 feet long and perhaps at the surface it is 7 feet wide, narrowing a little as you go down it into the hole; it has a depth perhaps, if the loose

dirt down there would be cleaned out, perhaps 11 feet. It would be about 9 or 10 feet standing on the dirt that is now in the hole.

Q. Did you take any samples from that hole?

A. Yes, sir, I took three samples from that hole.

Q. Have you got any of the stuff taken from that hole in the room?

A. Yes, sir, I have four samples; I took a sample in the east end of the shaft; there is exposed in this shaft a small streak; it would perhaps run from where it makes its appearance at the surface; at a depth of 4 or 5 feet the streak is a little wider; it is mixed there, but as you go down, it gets a little more compact between the rock and down at a depth of 7 or 8 feet it would perhaps average on the east end 8 inches and on the west end about the same—in some places a little wider and some places a little narrower.

Q. When you say from the surface, do you mean from the surface of the bedrock or level?

A. From the surface of the level; there has been perhaps 6 inches of dirt around the hole that is not the original surface soil; then there is around there about 2 feet of surface, yes $2\frac{1}{2}$ feet; then below that the ground is broken and mixed with debris until you go perhaps down 4 or 5 feet: then the ground gets more into place; you might begin to say it was in place down at the bottom of the shaft, but it is still broken and altered by surface influences.

Q. What is the result of the assays of the samples you took from the C hole?

A. Number 3 shaft, which is C; number 1 sample,

9 feet deep, east end, 8 inches in width about at the bottom of the hole; the best looking ore in the hole, to my mind; 2.2 ounces in silver, a trace of gold and a trace in copper; by a trace in copper I would mean anything that ran under half of one per cent of copper. It is very, very light.

Q. That is number 1?

A. Yes; number 2 sample, in number 3 shaft, are select chunks of hard rock from the same shaft. It ran 2.10 of an ounce in silver and a trace of gold. Number 3 is a portion of soft granular granite to the south, or in the south side of the hole; it ran 6/100 of an ounce in silver.

A1 represents an average broken course 4 inches in the east end of the shaft, at the depth of about 6 feet from the surface; A2 represents an average of $3\frac{1}{2}$ feet in the west end of the shaft, at about the same depth. In breaking these rocks, I didn't take any of the smaller soft streak. A3 represents 8 inches in the east end, at a depth of about 6 or 7 feet, and A4 represents about 10 inches in the west end, at about the same depth. There is not as much difference between A4 and A2 as there is between A1 and A3. That describes all the samples I took from there.

Q. Referring now to your visit to the A hole, also to your visit to the C hole, state how the stuff in the two seams that are in those holes compare one with the other.

A. The stuff in A hole is quite different from the stuff in C hole.

Q. They are not the same at all, are they?

A. No, they are not the same; they are not in my

mind upon the same fracture or fissure. A presents a fairly good-looking vein and C the appearance of a vein that we call a stringer.

Q. What is a stringer?

A. A stringer is a small seam or vein that you find in the country rock, that may or may not lead to a larger lead, a stronger lead—not necessarily a good lead.

Q. Confining your attention to the C hole, was there anything there which in your opinion would justify the locating of a quartz lead on it?

A. Any seam in the earth that is stained up, a prospector will quite frequently locate.

Q. I am asking for your opinion?

A. No, I wouldn't locate it—not expecting it to be a mineral-producer; I might locate it for other purposes, but not as a quartz proposition I wouldn't.

By *The Court*. Would locate it for a townsite?

A. I would locate it for surface rights, whatever those rights might be valuable for—locate it for the purpose of holding ground.

Q. Now coming again to the hole that we have marked A—was there anything in that hole there which in your opinion would justify the expenditure of labor and money?

A. In my opinion, no sir; I wouldn't expend any money on the showing that there is in that C hole to-day.

Q. What do you say about the A hole?

A. Yes, sir, I mean the A hole.

Cross-Examination.

By *Mr Clark*. Q. You say if I understand you, that you might locate and hold this ground down there for surface purposes? A. Yes, sir.

Q. But not for mining purposes?

A. That is, I wouldn't locate it with the expectation and purpose of mining on the streak that is exposed there.

Q. But for the purpose of holding the surface?

A. I might do it for the purpose of holding the surface.

Q. Don't you know—if you have the experience that you say you have—that if you located this ground for surface purposes, as a quartz location, that you would be making affidavit to something that was not true?

A. No, sir, I don't.

Q. Don't you know, if you have had any experience as a miner, that in order to make a valid location to a quartz claim, you have to make affidavit to the effect that you have discovered a vein or lode, bearing mineral in place?

A. The term vein or lode as used in the affidavits is extremely indefinite.

Q. Do you remember the wording of the affidavit?

A. No, sir, I don't.

Q. How many location notices have you ever made out?

A. I have made out several location notices.

Q. You know they have to be sworn to?

A. Yes, I have sworn to them.

Q. And you can't remember what the language of this location notice is?

A. No; you might read it to me.

Q. It says you have discovered on the premises or ground in question, a vein or lode of quartz or other rock, in place, bearing gold, silver, copper, cinnabar, lead, etc.—enumerating the different minerals—I ask you if you do not know about these things, and you say you might locate this ground for surface purpose?

A. I do not deny there is a vein there; there is a vein there in the technical term of the word vein.

Q. What do you mean by the technical term?

A. Any fissure, any mineral-bearing crack in the rock.

Q. Then there is such a mineral-bearing crack in the rock there—you don't deny it?

A. Why certainly not.

Redirect Examination.

By *Mr. McIntire*. I desire to have the map offered in evidence as part of the plaintiff's case.

The map is admitted in evidence and marked Exhibit "A."

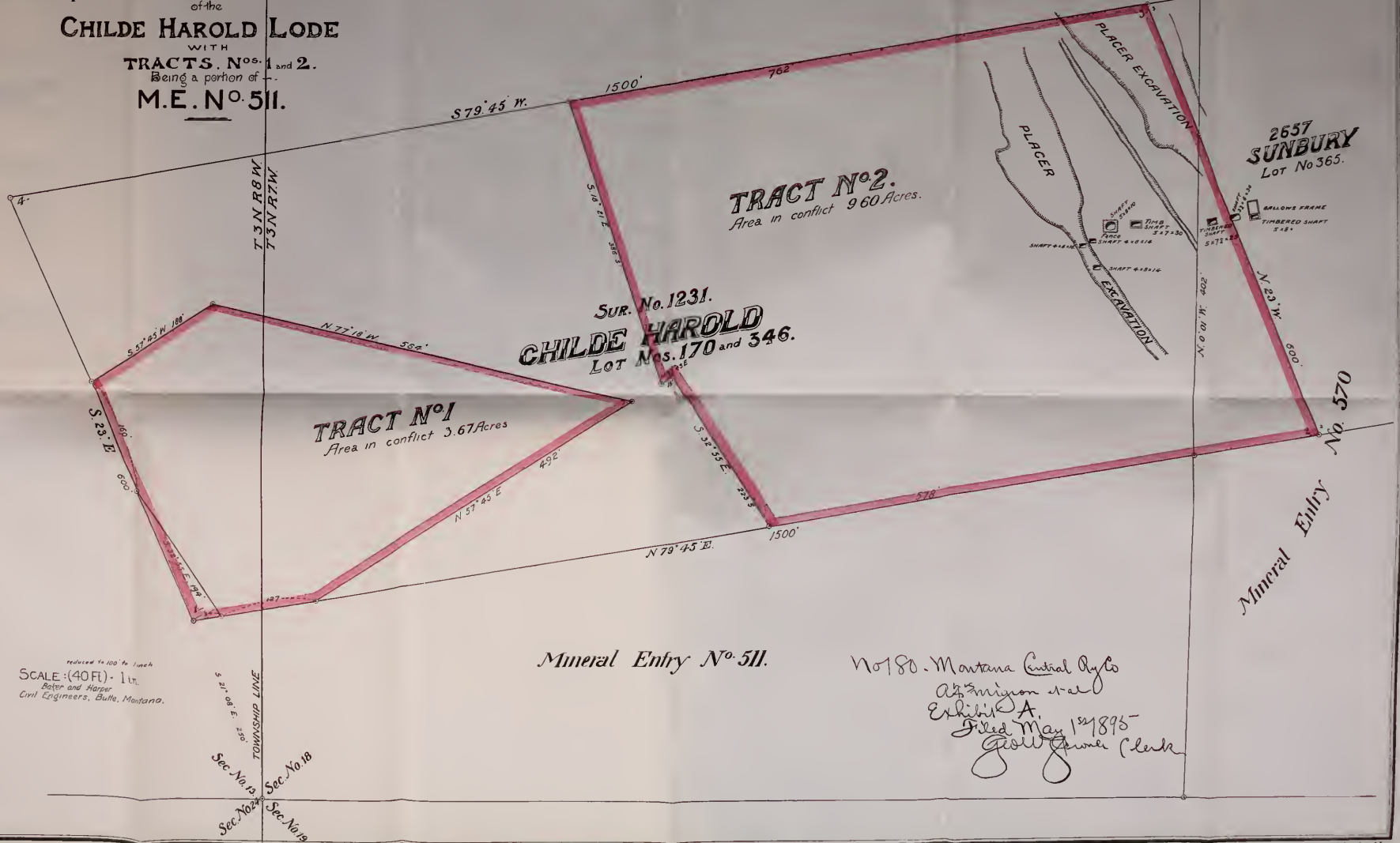
The plaintiff also offered certain rock, testified to by the witness Hand, in evidence as part of their case.

By *Mr. Clark*. We offer the other map in evidence. Admitted and marked Exhibit 15.

Plaintiff rests.

Filed May 18th, 1895. Geo. W. Sproule, Clerk.

MAP SHOWING THE CONFLICT
of the
CHILDE HAROLD LODE
WITH
TRACTS, Nos. 1 and 2.
Being a portion of
M.E. No. 511.



2657
SUNBURY
Lot No 365.

TRACT N^o 2.
Area in conflict 960 Acres.

SUR. No. 1231.
CHILDE HAROLD
Lot Nos. 170 and 346.

TRACT N^o 1
Area in conflict 3.67 Acres

Mineral Entry
No. 570

Mineral Entry N^o 511.

No 180. Montana Central Ry Co
at Missoula - et al
Exhibit A.
Filed May 1st 1895 -
Goldman Clerk

reduced to 100 ft. 1 inch
SCALE: (40 FT.) = 1 in.
Baker and Harper
Civil Engineers, Butte, Montana.

TOWNSHIP LINE
S 23° 08' E
Sec. No. 12
Sec. No. 10
Sec. No. 24
Sec. No. 18

And thereafter to-wit, on the 22d day of June, 1895, the opinion of the court was filed herein, which said opinion is in the words and figures, following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

MONTANA CENTRAL RAILWAY COMPANY,

vs.

A. F. MIGEON ET AL.

} No. 180.

Opinion.

BEATTY, District Judge. With the announcement of the decision in this cause it is fitting to note the ability and courtesy of the counsel who conducted the trial. While most clearly presenting the important issues, they did so with such happy comity towards each other, the witnesses, the Court, and all interested, as rendered the supervision of the proceedings a pleasure instead of the wearying performance of a duty. On July 2, 1877, the Morning Star lode claim was located 750 feet each way, easterly and westerly, from the discovery point in Summit Valley mining district, then in Deer Lodge, now Silver Bow, county, Mont. October 15, 1878, the Noyes placer mining claim was located, and included within its limits about 730 feet of the west end of the Morning Star lode claim. December 17, 1878, application for patent was made for such placer claim, and on July 28, 1880, patent was issued therefor, and subsequently a portion thereof was conveyed to plaintiff, and is now used

for depot and other railway purposes. January 1, 1882, the "Childe Harold" lode claim, now owned by defendants, was located at the discovery point of the Morning Star location, 50 feet easterly and 1,450 feet westerly from such point, a part of which is included in that portion of said placer claim so conveyed to plaintiff. On September 27, 1887, the defendants made application for a patent to such "Childe Harold" claim, whereupon plaintiff brought this action in support of its adverse claim made in the land office to such application, and now asks that its title to the ground in conflict be quieted.

Involved in this action are the propositions: (1) The annulment of the government's patent as to the ground in controversy; (2) what is a known vein, as defined by section 2333, Rev. St.; and (3) whether such a known vein existed within the placer claim on the 17th day of December, 1878, the date of the application for patent therefor.

1. Lengthy discussions of the legal propositions would be profitless, for their solution seems to have been reached by the court of final resort. The stability of a patent and the barriers to its successful assault are indicated in the Maxwell Land Grant Case, 121 U. S. 365-381, 7 Sup. Ct. 1029, where the supreme court says:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of

evidence which leaves the issue in doubt. If the proposition * * * is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases * * * the effort to set them [patents] aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof. * * * It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This is reaffirmed in *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307-317, 8 Sup. Ct. 131, which was an action by the government to vacate the patent for coal lands, wherein it is said that the proofs to do so must be "clear, convincing, and unambiguous"; and in *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673-676, 9 Sup. Ct. 195, being a direct action to cancel a placer patent because an alleged known lode was neither excepted nor paid for, the Court says:

"The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of the public lands, can only be overcome by clear and convincing proof."

Without giving further attention to the views of that court upon this point, it must be concluded that all pre-

sumptions favor the validity of the placer patent; that the patentee had fully complied with the law in all respects; that at the time of his application the "Childe Harold" vein was not a known vein; and that, unless the defendants overcome these presumptions by clear and convincing proof, the plaintiff must prevail.

2. What constitutes a known vein under said section 2333 and the definitions of the courts, is not entirely clear. The question is more easily answered if it be conceded that the requisites of a vein which justify a location under section 2320 are different from those applied to a known vein under the other section. It must be admitted that but slight indications of a defined and mineral-bearing ledge have been held sufficient in many cases to support a location or a valid mining claim. Justice Field's definition in the Eureka case, Fed. Cas. No. 4,548 is familiar—that a lode "is a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." In *North Noonday Min. Co. v. Orient Min. Co.*, 6 Sawy. 308, 1 Fed. 522, and in *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11 Fed. 675, Judge Sawyer said it is "a seam or fissure in the earth's crust, filled with quartz carrying gold, silver, or other valuable mineral deposits named in the statute." In *Mining Co. v. Cheesman*, 116 U. S. 535, 536, 6 Sup. Ct. 481, is approved the following:

"A lode or vein is a body of mineral or mineral-bearing rock within well defined boundaries in the general mass of the mountains. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well estab-

lished, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountains, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, the boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found although at considerable intervals, and in small quantities, it is called a lode or vein."

It is held that:

"When the locator finds rock in place, containing mineral, he has a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low." *Book v. Mining Co.*, 58 Fed. 120.

That "a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it in expectation of finding ore, and that a valid location may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only," is adopted in *Burke v. McDonald* (Idaho) 29 Pac. 101, and in *Harrington v. Chambers* (Utah) 1 Pac. 375. The last case, on appeal to the supreme court, was affirmed, but without discussing this proposition, which was involved in the appeal. 111 U. S. 350, 4 Sup. Ct. 428. It is needless to add to the above other similar definitions. They establish the liberal

rule that it is not necessary, to the location of a valid claim under section 2320, that ore of commercial value in either quantity or quality must first be discovered within its limits. While the practical observer will commend the rule, it must be reasonably applied. To apply it to every seam or fissure which may be filled with matter containing traces of the precious metals, whether in or remote from mineral country, whether valuable or worthless as a mining claim, would be a perversion of a liberal law. The vein or lode which the statute directs must be discovered before the location of a claim must be one that, from all its indications, has a present or prospective commercial value, for only "lands valuable for minerals" are subject to appropriation as mining claims. Section 2318. Hence, in any case, it may be an open question whether a location includes land valuable for minerals, or whether it is based upon some barren seam or fissure which may be easily found in all localities in which there has been much disturbance of the earth's crust.

There are other and later authorities, which seem not only to modify the above, but also to emphasize the statute that the land must be "valuable for minerals," by holding that to claim them as mineral they must be more valuable for that than for other purposes, and in defining a known ledge under section 2333 require stronger evidence of a vein and mineral deposits than is required by some of the courts for the location of a valid claim under section 2320; but they are generally cases similar to the one under consideration, of contests between parties claiming the same land for different purposes. Diffe-

back *v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, is a case of contest between the plaintiff, holding a placer patent, and defendant, claiming under an unpatented townsite location, in which, on page 404, 115 U. S., page 95, 6 Sup. Ct., the Court says: "We say land known at the time to be valuable for its minerals, as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditure in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable;" and then refers to the provisions of section 2318, by which "lands valuable for minerals" are "reserved from sale" and for location as mineral lands. *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, was an action to cancel placer patents because veins had not been excepted. At page 683, 128 U. S., page 195, 9 Sup. Ct., it is said:

"It is not enough that there may have been some indication, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as known veins or lodes. To meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

The case of *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, was a contest between the owner of a patented lode claim and claimants under a prior townsite patent, in which is fully considered the question of exception of mineral lands from the operation of a townsite or other patent, and the characteristics of such lands,

and approvingly refers to numerous rulings which held, in effect, that they must be more valuable for minerals than for other purposes; and that it is not sufficient that they merely contain mineral, but that they must contain it in sufficient quantity to make them valuable as mineral lands; and, in harmony with what it had before said, the Court says, on page 519, 139 U. S., page 628, 11 Sup. Ct.:

“There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term ‘mineral’ in the sense of this statute is applicable.”

And, after a review of the rulings further, on page 524, 139 U. S., page 628, 11 Sup. Ct., that:

“It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction.”

The case of *Iron Silver Min. Co. v. Mike & Starr Gold and Silver Min. Co.*, 143 U. S. 394, 430, 12 Sup. Ct. 543, is important, because, after it had been once submitted, the Court ordered a re-argument upon the questions “what constitutes a ‘lode or vein,’ within

the meaning of sections 2320 and 2333 of the Revised Statutes," and "what constitutes a known lode or vein, within the meaning of section 2333:" and, like the case at bar, it was a contest between the patentee of a placer claim and the claimant of a lode located after application made for patent to the placer claim. On page 404, 143 U. S., page 543, 12 Sup. Ct., it is said:

"It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute."

Then, after quoting the extracts above noted from 116 U. S. 536, 6 Sup. Ct. 481, and 128 U. S. 683, 9 Sup. Ct. 195, it concludes that:

"It is, after all, a question of fact for a jury. It cannot be said, as a matter of law, in advance, how much of gold or silver must be found in a vein before it will justify exploitation, and be properly called a 'known' vein."

It may be doubted that this decision directly modifies the former views expressed by the Court that a well defined mineral ledge must be proven to exist before a patent, issued for some other purpose, will be overthrown in its favor; but such modification seems to some extent to be implied from the quotation without disapproval of the liberal rule adopted in 116 U. S. and 6 Sup. Ct., *supra*, from the manner of its quotation, which seems to indicate that the Court considered it somewhat antagonistic to other decisions, and from the argument of the dissenting opinion. However, this decision may be

viewed—and it is cited with confidence by each party in this case—the stricter view is adhered to in *Dower v. Richards*, 151 U. S. 658–662, 14 Sup. Ct. 452:

“The Court held that if the ledge was not known, at the time of the acquisition of the townsite patent, to contain such an amount of minerals as to be valuable for mining purposes, it was not excepted from the operation of that patent. There can be no doubt that the decision of the supreme court of the State in this respect was correct. It is established by former decisions of this court that under the acts of congress which this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do, in fact, contain minerals, or even valuable minerals, when the townsite patent takes effect; that they must at the time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the townsite patent.”

The conclusion reached from the foregoing citations is that, before a patent for a placer claim can be canceled or modified upon application of a ledge claimant, the latter must establish by clear and convincing proof that at the date when the application was made for patent to the placer claim, either that such placer applicant knew, or might have known by reasonable inspection, inquiry, or diligence, or that the community generally knew (Iron

Silver Min. Co. v. Mike & Starr Gold and Silver Min. Co., 143 U. S. 402, 12 Sup. Ct. 543) that a mineral-bearing ledge of rock in place existed within the limits of such placer claim; that such ledge was valuable for its minerals, which were in such quantity, and of such quality, as, under the then existing circumstances, would justify expenditure for the purpose of extracting them; and that more than merely indications of a mineral-bearing ledge must have then existed.

3. Has the evidence so shown within the limits of the Noyes placer claim, on the 17th day of December, 1878, the existence of such a mineral-bearing ledge or lode? Only the evidence of the conditions existing at the date named is pertinent. At that time two shafts or holes existed—one at the discovery of the lode claim, and about 20 feet east of the east line of the placer claim; and the other about 75 feet west of such line. Their depth at that time is not clearly shown, but the first was about 10 feet below the surface of the bedrock, and the other but a few feet deep, and of irregular dimensions. As to what was discovered in them the witnesses differ much. A review of the testimony will not be made, but only the impression it created stated. It is that a vein or fissure was developed in the discovery shaft, but that then there was not sufficient work done to show a vein in the other shaft; that, while the vein matter or contents of the ledge at the discovery shaft may have been such as justified the location of a lode claim under section 2320 and some of the rulings of the courts, it was not of such value as would then have paid, or even now pay, the expense of its extraction, or for the exploitation of the claim, and

not such as the supreme court has held sufficient to justify the cancellation of a placer patent in support of a ledge claim in cases similar to this. Aside from the differing testimony of the witnesses, there are some established facts that strongly corroborate this conclusion. All the work done on this ledge prior to the application for the placer patent was done upon the Morning Star location, but which did not result in such development as induced the owners of that claim to hold it, for they abandoned it as worthless. The "Childe Harold" has been located for over 13 years.

There does not seem to be any claim that more work than that necessary to hold it has been done thereon. The work consists of several shafts, easily and inexpensively made. There is no evidence to satisfy me that any of the work was done with the view of developing a valuable mine. While it is true that poor men, in these times of depressed price of silver, are not likely to do more work than they must, yet it is hardly to be expected that a claim held to be valuable for copper, as this is, would be carried by these defendants from the year 1885—when as appears by their deed, in evidence, they purchased it for \$75—to the present, practically without any effort to develop it into a value property. During the trial, witnesses spoke so freely of the location of mining claims about Butte City for surface purposes and value instead of for the minerals they contained, that the impression was left that it was no unusual thing in that vicinity to locate mining claims to be utilized as town lots and this, too, without any apparent thought that it was illegal. That such has been the practice there, is con-

firmed from a plat exhibited during the trial, which showed the entire site of Butte City, and much of the adjoining country, covered with a blanket of mining locations, the lines of all fitting each other as closely and snugly as those of town lots and city additions. It is certainly true that nature has been most lavish in her mineral gifts to the locality of Butte City, for so many known great veins exist no place else on earth as there; but it must be doubted that mineral-bearing ledges within the meaning of the law are nearly so numerous anywhere as the mining locations are there, and it must be concluded that many of them were made without the sanction of law. It may not be that the "Childe Harold" was located, or is now held, merely for its surface value, but it is held that it has not been proven that on the 17th day of December, 1878, a known vein or lode existed within the limits of the Noyes placer claim.

That the placer claim included a part of what was the Morning Star, and was located before the latter had been forfeited, is an objection that cannot be considered in a collateral attack upon a patent, and, so far as concerns this proceeding, that defect was cured by the issue of the patent.

Other questions were referred to in argument, but it is deemed unnecessary to now consider them. Judgment must follow for the plaintiff as prayed, and it is now so ordered.

Dated June 18th, 1895.

In the absence of counsel it is further ordered that

each have 30 days after notice of this decision in which to take any steps desired.

Filed June 22, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 17th day of July, 1895, a decree was filed and entered herein, which said decree is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-	} Plaintiff,
PANY,	
	vs.
ACHILLE F. MIGEON, BENJAMIN TIBBEY	} Defendants.
and NICHOLAS B. RINGELING,	

Decree.

This cause came on regularly for trial on the 30th day of April, A. D. 1895: Present, the plaintiff by its counsel, H. G. McIntire and A. J. Shores, and the defendants by their counsel, George A. Clark; witnesses were duly examined, and the testimony being all in, the Court found as facts herein:

That the plaintiff is the owner of, in the possession of, and entitled to the possession of all and singular the premises set out and described in the complaint herein, and hereinafter described:

That said premises constitute and are a portion of mineral entry No. 511 for which application for patent from the United States was duly made upon December 17, 1878, and for which a United States patent was duly issued to the applicants therefor on July 28, 1880.

That at the time said application for patent there was no lode of quartz containing gold, silver, copper or other metals known to exist within the exterior boundaries of said mineral entry No. 511.

That all and singular the averments of plaintiff's complaint and replication herein are true, and that the averments of the answer of the defendants herein inconsistent therewith are not true, and that plaintiff is entitled to a decree as prayed for in its complaint herein.

Wherefore, it is now hereby ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in its complaint herein against the defendants, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be, and it is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that its title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants, or either of them, who are hereby perpetually estopped and enjoined from setting

up any claims thereto, or any part thereof. Said premises are bounded and described as follows, to-wit:

All and singular those certain lots and parcels of ground both situated in Summit Valley Mining District in the County of Silver Bow and State of Montana, and being portions of mineral entry No. 511, made by John Noyes and others, to-wit:

Beginning at a point on the south boundary of lot 346, the alleged "Childe Harold" lode claim in Township 3 north, of Range 8 west, from which the southwest corner of said lot 346 bears south 79 deg. 45 min. west 34 feet distant, and running thence north 79 deg. 45 min. east 127 feet, thence north 57 deg. 45 min. east 492 feet, thence north 77 deg. 18 min. west 564 feet, thence south 57 deg. 45 min. west 188 feet, thence south 23 deg. east 160 feet, thence south 32 deg. 55 min. east 194 feet to the place of beginning, containing an area of 3.67 acres, more or less.

Also beginning at corner No. 3 of lot 170, the alleged "Childe Harold" lode claim in Township 3 north, of Range 7 west, and running thence south 79 deg. 45 min. west 762 feet, thence south 18 deg. 21 min. east 386.5 feet, thence north 57 deg. 45 min. east 16 feet, thence south 32 deg. 55 min. east 223.5 feet, thence north 79 deg. 45 min. east 578 feet, thence north 0 deg. 01 min. west 402 feet, thence north 23 deg. west 193 feet to the place of beginning, containing an area of 9.60 acres, more or less.

And it is hereby further ordered, adjudged, and decreed that the plaintiff do have and recover its costs, hereby taxed at two hundred seventy-three and 85-100

dollars against the said defendants, and that it do have execution therefor.

Dated July 15, A. D. 1895.

JAS. H. BEATTY,

Judge.

Entered July 17, 1895. GEO. W. SPROULE, Clerk.

[Endorsed]. Title of Court. Title of Cause. Decree. Filed and entered July 17, 1895. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE MONTANA CENTRAL RAILWAY COMPANY,

Complainant,

vs.

ACHILLE F. MIGEON, BENJAMIN TIBBEY and

N. B. RINGELING,

Defendants.)

Enrollment.

The complainants herein, on the 24th day of December, 1891, filed the following papers transferred from the District Court of the 2d Judicial District, Silver Bow county, Montana, to-wit: complaint, summons, demurrer, answer, demurrer to part of answer, stipulation extending time to file replication, replication, præcipe substituting counsel, request for transfer, copy of order of transfer. And thereupon said cause was duly docketed

in said U. S. Circuit Court, said papers in said cause being hereto annexed.

And thereafter, to-wit: on the 1st day of April, 1895, complainant filed its notice of motion herein which is hereto annexed:

And thereafter, to-wit: on the 1st day of April, 1895, the depositions on part of the defendants were received and filed and thereafter duly published.

And thereafter, to-wit: on the 3rd day of April, 1895, an order permitting plaintiff to take its testimony orally in open court was duly made and filed, which said order is hereto annexed.

And thereafter, to-wit: on the 17th day of April, 1895, three stipulations were duly filed in said cause which said stipulations are hereto annexed.

And thereafter, to-wit: on the 26th day of April, 1895, the said cause was set for hearing on the 30th day of April, 1895.

And thereafter, to-wit: on the 30th day of April, 1895, the said cause came on regularly for hearing and thereafter on the 2nd of May, 1895, submitted to the Court for consideration and decision.

And thereafter, to-wit: on the 22nd day of June, 1895, the opinion of the Court was received and filed, which said opinion is hereto annexed:

And thereafter, to-wit: on the 17th day of July, 1895, a decree was received, filed and entered, being a final decree in said cause which said final decree is hereto annexed.

Whereupon the process, pleadings and decree together with other papers filed in said cause, are duly annexed

hereto and said final decree duly enrolled in accordance with the rules and practice of said court.

July 17, 1895.

GEO. W. SPROULE, Clerk.

[Endorsed]: Enrolled Decree. Filed July 17th, 1895.
Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 12th day of December, 1895, an assignment of errors was filed herein, which said assignment of errors is in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-
PANY (a Corporation),

Plaintiff,

vs.

A. F. MIGEON, N. B. RINGELING and
BENJAMIN TIBBEY,

Defendants.

Assignment of Errors.

Assignment of errors upon behalf of the defendants, Achille F. Migeon, N. B. Ringeling, and Benjamin Tibbey.

Now come the defendants last above named, after decree filed and entered, and say that in the record and proceedings in the above-entitled cause, and particularly

in the decree entered therein, there is manifest error in this, to-wit:

The Court erred in the admission and rejection of evidence as follows:

1. In rejecting, if it did reject it, (see note by Clerk) as evidence the original notice of location of the Morning Star lode claim "Exhibit A," offered by defendants in their deposition evidence and objected to by plaintiff, because:

a. Said notice fulfills the requirements of law and is by law made primary evidence of the acts constituting a valid location of a quartz claim.

2. In rejecting, if it did reject it, the deposition testimony of the witness Charles Colbert that his reason for sinking shaft C 75 feet west of the original discovery on the Morning Star claim, was that he saw at the discovery shaft that the vein ran east and west, and that he knew he would strike the lead at shaft C, because:

a. It was relevant and material evidence showing the extent of the Morning Star vein and its strike, essentials of a locatable discovery and that said lode extended into the ground in dispute in this action.

b. It was admissible evidence to prove, in connection with the admission of John Noyes the placer locator and patentee, on the trial that he knew of the Morning Star discovery at or about the time it was made by Charles Colbert, that if he had made such examination of the

NOTE.—Owing to Judge Beatty's limited time in Montana, the deposition testimony was not read at the trial, upon the understanding between counsel and the Court that exceptions would be allowed to the rulings made upon the objections noted therein. In the opinion no ruling is made upon any of these objections.

Clerk.

ground subsequently located by him as placer, as the law requires he would have had personal knowledge that the strike of the Morning Star vein was into said placer ground; and that he is consequently chargeable with such knowledge actual and constructive.

3. In rejecting, if it did reject it, the deposition testimony of defendants' witness W. P. Emery, that the results of assays made by him of the Anderson lode in the vicinity of the Morning Star claim and at about the time of its location, was about 14 ounces in silver and a small amount of gold to the ton, because:

a. Said evidence was brought out by plaintiff on cross-examination of the witness.

b. Such evidence was competent and relevant as tending to prove that at the time of the Morning Star location land in the vicinity was valuable for quartz; that quartz lodes existed there and were known to exist; and as tending to disprove the testimony of plaintiff's witnesses to the contrary.

4. In rejecting the deposition of defendants' witness, George H. Newkirk, if it did reject it, of his conversation with Charles Colbert at the discovery shaft on the Morning Star in 1878 or 1878, in which Colbert stated that the ground was located, and Newkirk said that from what he saw of the quartz he thought it was a good piece of property, because:

a. Said statement by Colbert is admissible evidence as a part of the *res gestæ*, being a declaration made by Colbert concerning his own property while in possession thereof, and at about the time of its acquisition by him.

5. In rejecting the evidence of defendants' witness, Valentine Kropf, if it did reject it, of his conversation with Charles Colbert, in which the latter stated that the Morning Star claim was of full size, for the reasons given in assignment No. 4.

6. In rejecting as evidence, if it did reject it, Exhibit "D," the affidavit of the performance by Thomas Overend of the representation work on the "Childe Harold" claim for the year 1886, offered by defendants in connection with the deposition testimony, because:

a. It is by law made admissible evidence.

7. In rejecting, if it did reject it, as evidence, Exhibit "E," the affidavit of intention, duly recorded, to hold the "Childe Harold" claim for the year 1894, offered by defendants in connection with the deposition testimony, because:

a. It is by law made admissible evidence.

8. In rejecting as evidence, if it did reject it, Exhibit "F," the certified copy of the recorded notice of location of the "Childe Harold" claim by Harvey McKinstry, the original locator, offered by defendants in connection with the deposition evidence, because:

a. It is by law made admissible evidence.

b. In connection with Exhibits "G" and "H," and the original deed of the "Childe Harold" claim from Edward McKinstry to the defendants, Exhibit it is primary evidence of the title of defendants and of their grantors to the "Childe Harold" claim.

9. In rejecting as evidence, if it did reject it, Exhibit "G" the certified copy of the recorded decree of distribution rendered by the district court of Silver Bow

county, Montana, of the estate of Harvey W. McKinstry, the original locator of the "Childe Harold" claim, distributing the same to Edward McKinstry, the grantor of the defendants offered by the defendants in connection with the deposition evidence because:

a. In connection with Exhibit "G" and the original deed of the "Childe Harold" claim from said Edward McKinstry to the defendants, it is primary evidence of defendants' title to the "Childe Harold" claim.

10. In rejecting as evidence, if it did reject it, Exhibit "H," the certified copy of the recorded deed of the "Childe Harold" claim from Edward McKinstry to the defendants, offered by the defendants in connection with the deposition evidence, because:

a. It is primary evidence of defendants' title to the "Childe Harold" claim.

11. In rejecting the evidence of the Engineer John Gillie, a witness for the defendants at the trial, exception taken and allowed by the defendants, as to the results of an examination made by him of several excavations or shafts upon the "Childe Harold" claim and assays of ore taken therefrom, said shafts being on a direct line between shafts "A" and "C" the original points of discovery of the Morning Star vein, because:

a. Such evidence is material, relevant and competent to prove that the Morning Star vein justified exploitation and development; that it has been exploited and developed by the defendants at great expense, notwithstanding that their title to the claim has been disputed by this action during nearly the entire time since its purchase by them and such evidence would refute the

finding of fact made by the Court in its decree: "There does not seem to be any claim that more work than is necessary to hold the 'Childe Harold' claim has been done thereon"; and "There is no evidence to satisfy me that any of the work was done with a view to the development of a valuable mine."

b. Such evidence is corroborative of the testimony of Charles Colbert the original discoverer and locator of the Morning Star lode, as to its dimensions and strike at the time of its discovery by him in 1877, and that in that year he uncovered the vein in shaft 'C1,' 75 feet west of the original discovery shaft.

12. In rejecting as evidence the certified copy of the recorded notice of location of the Pay Streak quartz lode claim, offered by the defendants at the trial, said claim having been located in April, 1878, and adjoining the Morning Star claim on the west, because:

a. It is competent and material evidence, corroborative of the evidence of the defendants' witness Daniel Zenn given at the trial, as to the location of the Pay Streak lode claim by him, the date thereof, and that the Morning Star claim adjoined it on the east.

b. As evidence tending to prove, by its reference to the Morning Star claim as adjoining it on the east, that in April, 1878, the Morning Star claim was a known located claim, this being prior in time to the date of location of the John Noyes placer.

13. In admitting the evidence of J. E. C. Barker, plaintiff's witness at the trial, exception taken and allowed by defendants, as to the percentage of mineral or the values of ores necessary to make quartz mining pay in

Butte in 1878, and that the Morning Star vein could not then or now be worked at a profit, and as to the values of ores taken from the Aurora and Cora mines at about that time, because:

a. Such evidence is immaterial and irrelevant upon any issue involved in this action; the issue here is whether the Morning Star vein discovered in 1877 was a well defined mineral-bearing vein which would warrant exploitation or development. No law governing the acquisition of title to quartz mining property requires as an essential the discovery or taking out of ore of such value as will make quartz mining pay, and this principle is expressed in the decree.

14. In admitting the testimony of John Noyes, plaintiff's witness at the trial, exception taken and allowed by defendants, that the ground in controversy was comparatively of greater value for placer than for quartz mining in 1877 and 1878, because:

a. Said Noyes did not testify, nor is there any testimony in the record proving, or tending to prove, that the ground in controversy, or any part of it, had ever been worked or located as placer ground prior to or at the time of the Morning Star discovery and location in July, 1877.

b. Said Noyes' testimony does not show that any discovery of placer mineral deposits was ever made at the times mentioned on the ground in dispute, and therefore his testimony as to its value as placer ground is incompetent as opinion evidence not founded upon facts in evidence.

15. In admitting the testimony of De Grasse Palmer, plaintiff's witness at the trial, as to the percentage of mineral or the values of ores necessary to make quartz mining pay in 1878, and that the ground in dispute was more valuable in that year for placer than for quartz, because:

a. Such evidence is incompetent and immaterial for the reasons stated in assignments Nos. 13 and 14.

16. In admitting the testimony of L. S. Scott, plaintiff's witness at the trial, as to the selling price of copper ores at the Butte smelters in 1878, and that the ground in dispute was in that year of comparatively greater value as placer than of quartz ground, because:

a. Such testimony is incompetent for the reasons stated in assignment No. 14.

17. In admitting the testimony of Albert W. Nodding and D. G. Bronner, plaintiff's witnesses at the trial, that the ground in dispute was of comparatively greater value as quartz than as placer in 1878, because:

a. For the reasons stated in assignment No. 14, such testimony is incompetent.

18. In admitting the testimony of John McClaggin, plaintiff's witness at the trial, that in 1878 the ground in dispute was of comparatively greater value for placer than for quartz purposes; that in that year the expenditure of time and money to work ore carrying 3 ounces of silver and \$1 in gold to the ton would not be justified, and that smelter charges for treating ore in Butte in that year were \$60 per ton, because:

a. For the reasons stated in assignments Nos. 13 and 14 such testimony is incompetent and immaterial.

19. In admitting the testimony of H. Garfof, plaintiff's witness at the trial, exception taken and allowed by defendants, that copper of 27 per cent value would not pay to work in Butte in 1878, because:

a. For the reasons given in assignment No. 13 such evidence is incompetent and immaterial.

20. In admitting the testimony of W. F. Cobban, plaintiff's witness at the trial, exception taken and allowed by the defendants as to the value of the ground in dispute for town lot purposes in 1882, because:

a. Such testimony is irrelevant to any issue involved in this action.

21. There is manifest error in the decree in holding that the proposition of the cancellation of the government patent to the ground in dispute is involved in this action, because:

a. The annulment or cancellation of a patent from the United States to land, can be effected and the proposition only by a suit in equity brought in the name of the United States and for that purpose where the patent is voidable but not void, and the United States is not a party to this action.

b. The question of the cancellation of a patent cannot arise as to lands never granted by the patent or purporting to be granted thereby. The theory of the law with reference to placer patents is that they do not convey or purport to convey, any veins or lodes known to exist within the limits of the ground applied for at the date of application, or any quartz claims legally located upon such a vein or lode prior to such application; in the one case the lode or vein with the adjacent ground to the extent of

25 feet on either side of the center of the vein; in the other the located claim to the extent of the width as located not exceeding 300 feet on either side of the center of the vein located upon, are excepted from the placer patent unless expressly mentioned in the application for patent as effectually as though the exception were expressed in the patent by metes and bounds. The applicant for patent is conclusively presumed to waive all claims to such a vein or lode or located claim unless he expressly includes it in his application. The law governing the cancellation of a patent applies only in cases where the patent purports to convey, and does convey, the land as to which cancellation of the patent is sought, but where the issuance of the patent was secured by fraud. In this action if it is found as a fact that a quartz claim was located upon the ground in dispute, and that such location was made upon the discovery of a vein prior to or at the time of the application for the Noyes placer patent, and said application did not include said located claim or known vein, the placer patent never conveyed, or purported to convey, such known vein or located claim. The Court finds as a fact in its decree and opinion that the Morning Star claim was located July 2, 1877, and that a vein or fissure was developed in the discovery shaft, and that the Noyes placer located October 15, 1878, included 730 feet of the west end of the Morning Star claim. Upon this finding it follows as a matter of law that the Morning Star claim was a valid existing claim up to and including December 31, 1878, and that an inchoate title to the same had been withdrawn from the United States by the locators and

their assigns. The Noyes placer application did not include the Morning Star vein or claim, and therefore neither said application nor the patent issued thereon could include said 730 feet of the Morning Star claim. The title thereto remained in the government, in trust for the claimants under the existing location and their assigns upon the perfection of their title or subject to subsequent appropriation by location, upon abandonment or forfeiture.

c. Even if the theory of the law stated in "b" is erroneous and the Noyes placer patent does purport to convey the ground within the limits described therein, the proposition of cancellation cannot apply to a patent which is absolutely void. Upon the findings of fact by the Court as above stated, the placer patent as to the west 730 feet of the Morning Star claim would be void for the reason that at the time of the application for said patent said west 730 feet of the Morning Star claim was property and the power to convey it had been withdrawn from the United States and a patent purporting to convey it would be an absolute nullity. The title remained in the locators and their assigns to be perfected upon the performance by them of the acts required by law and upon abandonment or forfeiture by them revested in the United States subject to subsequent location. As the Court further finds in its opinion, as a fact, that the "Childe Harold" claim was on January 1, 1881, located at the discovery point of the Morning Star claim and that a part of it is included in the portion of the placer conveyed to the plaintiff, it follows that the defendants are entitled to a decree for that part of the "Childe

Harold" claim included within the limits of the Morning Star claim and that portion of the placer conveyed to the plaintiff.

22. There is manifest error in the decree and opinion of the Court in its findings of fact therein contained, that the defendants "have held the 'Childe Harold' claim since 1885 without any effort to develop it into a valuable property" and that "no work was done with a view of the development of a valuable mine" because:

a. Such finding is contrary to the uncontroverted evidence of the defendants, in the record, that the representation work has been done upon the claim since it was conveyed to the defendants except in the years 1893 and 1894 when the affidavits of intention to hold the claim were filed as required by law.

b. Such finding is inequitable and contrary to the facts disclosed by the record that the title to the premises in dispute has been in litigation since the commencement of this suit in 1887.

c. Such finding is not pertinent to any question of law involved in this action.

e. Such finding is contradictory to and inconsistent with the evidence of the performance of the representation work and the finding of fact elsewhere in the opinion that "there seems to be no claim made that more work than was necessary to hold the same (the "Childe Harold") has been done thereon." Representation work is development work and there is no rule of law which requires that development work or exploration under the constructive phrases "Justifying," "Exploration," "Exploitation" or "Expenditure" as used in the opinions of

the courts, shall be more in extent or greater in value than the representation work required by law to hold a quartz claim.

23. There is manifest error in the decree and opinion of the Court in holding that the propositions "what is a known vein as defined by Sec. Rev. Stat. 2333" and "whether such a known vein existed within the boundaries of the placer claim on December 17, 1878, the date of the application for patent therefor" are involved in this action, because:

a. Upon the findings of fact in the opinion stated ante with respect to the location of the Morning Star claim and the subsequent location of the Noyes placer, covering the west 730 feet of said claim, the law with respect to "known veins" is eliminated from the case and the question of law presented is "was the placer patent void as to the said 730 feet of the Morning Star for the reason that at the date of application therefor said portion was held by prior lawful appropriation as a claim was property, and the government had no power to convey it."

24. There is manifest error in the opinion and decree of the Court in holding "that the placer claim includes a part of what was the Morning Star and was located before the latter had been forfeited, is an objection that cannot be considered in a collateral attack upon a patent." because:

a. If the Morning Star was at the date of Noyes application, a known claim, and John Noyes had actual or constructive notice of its existence, the placer patent did not convey or purport to convey said 730 feet of the

Morning Star claim. A patent is not collaterally attacked as to something it does not purport to grant.

b. If the placer patent did purport to convey said 730 feet of the Morning Star it was to that extent void, and a void patent is subject to collateral attack. Said 730 feet, being embraced in a "known claim" was excepted from the patent by act of congress and by the terms of the instrument itself.

25. There is manifest error in the finding of fact in the decree and opinion with reference to the location in Butte and vicinity of mining claims for townsite and other purposes without the sanction of law and the manifest consideration thereof to the disadvantage of the defendants, because:

a. Such finding is not pertinent to any issue in this action.

b. Such finding is contradictory of the finding of fact elsewhere in the opinion that the Morning Star claim was located upon a vein.

c. The only evidence in the record to support such finding was that of plaintiff's witnesses that they might locate the ground in dispute as mining ground, for surface purposes, in violation of law and upon false affidavits and in fraud of the United States, and detracts from the competency of their evidence to the advantage of defendants.

26. There is manifest error in the opinion and decree in the finding of fact that the Morning Star claim was abandoned, because:

a. There is no evidence in the record that it was ever abandoned by Harvey McKinstry or Charles Colbert.

b. Such finding is contradictory to the finding contained elsewhere in the opinion that the Morning Star claim was located upon a vein July 2, 1877. If it was so located at said time the law preserved its existence as a valid existing claim up to and including December 31, 1878, subsequent to the date of the placer application.

c. Even if it was abandoned after said date the Noyes placer patent did not convey any part of it. Said patent could convey no more than Noyes asked for in his application, and he did not ask for any part of the "Harold" claim as such, and the law conclusively presumes that it was excepted from the application. If it was subsequently abandoned, it became a part of the public domain subject to relocation.

26. There is manifest error in the decree in the application of the cases of *Davis v. Wiebold*, 139 U. S. 537, *Dower v. Richards*, 151 U. S. 558, *Deffenbach v. Hawke*, 115 U. S. 392, to the case at bar adversely to defendants. Those cases arose between claimants of the same land as mineral upon the one hand and purposes other than mineral on the other. They were dependent upon the construction of Rev. Stat. Sec. 2392. Here the parties both claim title to the land as mineral land, under Rev. Stat. Sec. 2333.

26 a. There is error in the decree in adjudging for plaintiff according to the prayer of the complainant, because:

a. There is no evidence in the record of any damage resulting from occupation of the premises, and said Court interpret the law as claimed by the defendants.

27. There is manifest error in the opinion of the Court in holding that "the defect that the placer claimed covered a part of what was the Morning Star claim and was located before the latter was forfeited is cured by the issue of the placer patent," because:

a. For the reasons stated ante the placer location was an absolute nullity and void as to the ground covered by the Morning Star claim. The issue of a patent cures defects in a location, but cannot be held an absolutely void one.

28. There is manifest error in the finding in the decree that the Morning Star vein was not a known vein on December 17, 1878, and that on said date no known vein or lode existed within the limits of the Noyes placer claim, because:

a. Such findings are not supported by the evidence and are contrary to the evidence contained in the record that the Morning Star vein was on July 2, 1877, known to exist in the premises in dispute and has ever since been known to so exist, and was on said date a located claim and existed as such to January 1st, 1879.

29. There is manifest error in the order of the court contained in the record taxing costs, because:

a. Said costs were not legally taxed for the reasons stated in defendants' appeal from the order of the clerk taxing the same contained in the record.

b. Plaintiff's witnesses were not summoned nor did they file affidavits as required by the rules of the court.

Wherefore, the defendants pray that the decree of the Circuit Court for the Ninth Circuit, District of Montana, be reversed with directions to said court to enter a decree

in favor of the defendants for that portion of the "Childe Harold" quartz lode claim which is within the limits of that portion of the Noyes placer claim conveyed to the plaintiff and the original Morning Star claim, and for costs.

GEO. A. CLARK,
Solicitor for the Defendants.

[Endorsed]: Title of Court. Title of Cause. Assignment of Errors. Filed and entered Dec. 12, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 12th day of December, 1885, a petition for and allowance of appeal was filed herein, which said petition is in words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

ACHILLE F. MIGEON, N. B. RINGELING and
BENJAMIN TIBBEY,

Defendants.

Petition for and Allowance of Appeal.

The above-named defendants, conceiving themselves aggrieved by the decree entered in the above-entitled cause on June 18, 1895, and by the order overruling their petition for rehearing, dated September 4, 1895,

and from the other orders entered in said cause, do hereby appeal from said decree and orders to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this, their appeal, may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree and orders were made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit.

GEO. A. CLARK,
Solicitor for the Defendants.

Upon the foregoing petition it is, on this 20th day of December, 1895, ordered that the appeal be allowed as prayed for.

JAS. H. BEATTY,
Judge.

Service of the within petition and allowance of appeal duly admitted this January 4, 1896.

H. G. McINTIRE,
Solicitor for Plaintiff.

[Endorsed]: Title of Court. Title of Cause. Petition for Allowance of Appeal. Filed Dec. 12, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 27th day of December, 1895, a bond on appeal was filed herein, which said bond is in words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM- PANY (a Corporation),	} Plaintiff,
vs.	
A. F. MIGEON, N. B. RINGELING and BENJAMIN TIBBEY,	} Defendants.

Bond on Appeal.

Know All Men By These Presents, that we, Jared E. Gaylord and James A. Talbott, both of the city of Butte, State of Montana, are held and firmly bound unto the above-named, The Montana Central Railway Company, in the sum of five hundred dollars to be paid to the said, The Montana Central Railway Company, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Scaled with our seals and dated the 10th day of December, 1895.

Whereas, the above-named defendants have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered and entered in the above-entitled action July 18, 1895, in the

United States Circuit Court, Ninth Circuit, District of Montana.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make such appeal good then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JARED E. GAYLORD. [SEAL]

JAMES A. TALBOTT. [SEAL]

STATE OF MONTANA, }
County of Silver Bow. } ss.

On this 10th day of December, 1895, personally appeared before me, a notary public in and for Silver Bow county, Montana, Jared E. Gaylord and James A. Talbott, known to me to be the persons who subscribed the foregoing instrument who severally acknowledged to me that they executed and delivered the said instrument.

Witness my hand and official seal the day and year last above written.

[SEAL]

ANDREW T. COLLINS.

Notary Public in and for Silver Bow county, State of Montana.

[Endorsed]: Title of Court. Title of Cause. Appeal Bond. Within bond is hereby approved this 20th day of December, 1895. James H. Beatty, Judge. Filed and entered December 27, 1895. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on said 27th day of December, 1895, a stipulation and order was filed herein, which said stipulation and order is in words and figures following, to-wit:

THE MONTANA CENTRAL RAILWAY COM- PANY (a Corporation),	Plaintiff,	}
vs.		
A. F. MIGEON, N. B. RINGELING and BENJAMIN TIBBEY,	Defendants.	}

Stipulation.

It is hereby stipulated by and between the parties to this cause that upon an appeal taken from the decree entered herein July 18, 1895, the original maps, deeds and other writings, exhibits in said cause may be transmitted directly to the appellate court and that in the preparation of the transcript of the record upon appeal it shall not be necessary to include such exhibits.

H. G. McINTIRE,
Solicitor for Plaintiff.
GEO. A. CLARK,
Solicitor for Defendants.

United States Circuit Court, Ninth Circuit, District of Montana.

THE MONTANA CENTRAL RAILWAY COMPANY,

Plaintiff,

vs.

A. F. MIGEON, N. B. RINGELING and,

BENJAMIN TIBBEY,

Defendants.

Order Transmitting Original Exhibits.

It appearing that an appeal has been taken and allowed from the decree entered in this cause, and it appearing necessary and proper, it is now on motion of Geo. A. Clark, defendants' counsel, ordered that all exhibits heretofore filed with the clerk of this court in this cause shall be transmitted to the United States Court of Appeals for the Ninth Circuit, together with the transcript of the record and proceedings upon said appeal to be used in said court upon the rendition herein of the judgment of said Circuit Court of Appeals.

JAS. H. BEATTY,

Judge.

[Endorsed]: Title of Court and Cause. Stipulation and Order. Filed and entered Dec. 27, 1895. Geo. W. Sproule, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-
PANY (a Corporation),

Plaintiff,

vs.

ACHILLE F. MIGEON, N. B. RINGELING
and BENJAMIN TIBBEY,

Defendants.

Citation on Appeal.

UNITED STATES OF AMERICA—ss.

The President of the United States to The Montana
Central Railway Company, plaintiff, Greeting:

You are hereby cited and admonished to be and ap-
pear at a United States Circuit Court of Appeals for the
Ninth Circuit, to be holden at the city of San Francisco,
on the 18th day of January, 1896, pursuant to an appeal
filed in the clerk's office of the Circuit Court of the
United States, Ninth Circuit, District of Montana,
wherein the above-named defendants are appellants
and the above-named plaintiff is respondent, to show
cause, if any there be, why the judgment in the said
appeal mentioned should not be corrected and speedy
justice should not be done to the parties on that behalf.

Witness the Hon. JAMES H. BEATTY, United States

District Judge, District of Idaho, this 20th day of December, 1895.

JAS. H. BEATTY,
Judge.

Service of the within citation, by copy served this day, January 4th, 1896, accepted.

H. G. McINTIRE,
Solicitor for Plaintiff.

Filed Jan. 4th, 1896. Geo. W. Sproule, Clerk.

UNITED STATES OF AMERICA. }
District of Montana. } ss.

Clerk's Certificate to Transcript.

I, George W. Sproule, clerk of the Circuit Court of the United States, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 457 pages, numbered consecutively from 1 to 457, inclusive, is a true and complete transcript of the records, process, pleadings, orders, depositions, testimony, opinion, final decree, and other proceedings in said cause, and of the whole thereof, with the exception of the exhibits, as appears from the original records and files of said court; and I further certify and return that I have annexed to said transcript and include within said paging the original citation and proof of service thereof; that the original exhibits are forwarded with record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, in the District of Montana, this 13th day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the 120th.

[SEAL]

GEO. W. SPROULE,
Clerk.

UNITED STATES OF AMERICA, }
District of Montana. } ss.

I, George W. Sproule, clerk of the said United States Circuit Court, do hereby certify that the costs of record herein amounts to the sum of \$190.50, and has been paid by the defendants. Attest my hand and the seal of said court this 13th day of January, 1896.

[SEAL]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 276. United States Circuit Court of Appeals for the Ninth Circuit. Transcript of Record. Appeal from the United States Circuit Court, District of Montana. A. F. Migeon, B. Tibbey and N. B. Ringeling, Appellants v. The Montana Central Ry. Co.

Filed January 17th, 1896.

F. D. MONCKTON,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM-
PANY,

Plaintiff,

vs.

ACHILLE F. MIGEON, BENJAMIN TIBBEY and
NICHOLAS B. RINGELING,

Defendants.

Memorandum of Costs and Disbursements.

WITNESS FEES.

Attendance in court on trial, and mileage coming
and going:

Henry Palmer, 2 days, mileage 146 miles,	\$10 30
John Noyes, 2 days, mileage 146 miles,	10 30
Al. Noddin, 2 days, mileage 146 miles,	10 30
D. S. Scott, 2 days, mileage 146 miles,	10 30
David Brennan, 2 days, mileage 146 miles,	10 30
J. C. E. Barker, 2 days, mileage 196 miles,	12 80
Jno. Garforth, 2 days, mileage 146 miles,	10 30
Jno. McLaggin, 2 days, mileage 146 miles,	10 30
T. J. Moffit, 2 days, mileage 146 miles,	10 30
W. F. Cobban, 2 days, mileage 146 miles,	10 30
C. H. Hand, 2 days, mileage 146 miles,	10 30
Marshal's fees,	5 00
Clerk's fees,	23 05
Docket fee,	20 00
To attending taking of 12 depositions each \$2.50,	30 00

Circuit Court, Ninth Circuit, District of Montana.

MONTANA CENTRAL R. R. }

vs. }

A. F. MIGEON, ET AL. }

The attendance upon taking depositions is objected to for reason that the statute means each attendance upon the taking of the deposition of one or more witnesses.

Charges for assays objected to as not legal costs.

Charges for maps objected to as not legal costs.

Charges for stenographic transcripts objected to as not legal costs.

*In the United States Circuit Court, for the Ninth Circuit,
District of Montana.*

MONTANA CENTRAL RAILWAY COMPANY, }

vs. }

A. F. MIGEON ET AL. }

Clerk's Ruling on Memorandum of Costs.

In the matter of taxation of costs:

1. Objection is made by defendants "to attending taking of 12 depositions each \$2.50:

Under section 824 Rev. Stat. this is allowable and the objection is overruled.

Broyles, et al. vs. Buck, Clerk, 37 Fed. 137.

Ferguson, et al. vs. Dent, et al. 46 Fed. 88.

2. Objection to charge for assays made.

I do not think this a lawful charge, and will disallow the same, and sustain defendants objection thereto.

“These were not incurred under any action of the Court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed.” See “the William Branfort 52 Fed. p. 395. In speaking of Experts—these assays were made to assist the expert in this case to testify, and, I do not believe the same is a proper charge.

3. Objection for maps.

I believe this a lawful charge and will allow the same, and overrule defendants' objection thereto.

Lillenthal vs. Southern Pacific Ry. Co., 61 Fed. 622.

4. Objection to charge for stenographic transcript.

As this charge was for a copy furnished to the counsel for plaintiff and not for filing in court, I will disallow the same.

See 52 Fed. p. 395. The William Branfort.

“This was simply for convenience, and not a copy necessarily obtained for use on the trial.” The item was properly rejected.

Also Atwood vs. Jaques, 63 Fed. p. 561.

“As these copies were evidently for the use of respondent or his counsel, they are not chargeable as costs in the case.”

5. Objection as to costs in State court:

Objection to allowance of said costs is overruled except as to item “To paid register and receiver of land office for filing of adverse claim and protest:” this was

not a cost, was not incurred in the State court, and I will disallow the same.

I therefore tax the costs in this case as follows:

Witness fees	\$115 80
Marshal's fees	5 00
Clerk's fees	23 05
Docket fee	20 00
To attending taking of 12 depositions at 2 50	30 00
For map for use at trial	25 00
To paid entry fee in State court	5 00
To I. Hamburger, stenographer, work in court	10 00
	<hr/>
Total	\$233 85

I disallow:

To making assays of ore	\$ 48 00
Paid register and receiver on protest	10 00
To bill of I. Hamburger, transcript	62 40
	<hr/>
Total	\$120 40

Respectfully submitted,

GEO. W. SPROULE,

Clerk.

Dated July 16, 1895.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

MONTANA CENTRAL RAILWAY COMPANY,
Plaintiff,

vs.

ACHILLE F. MIGEON, NICHOLAS B. RING-
ELING and BENJAMIN TIBBEY,
Defendants.

Motion to Retax Costs.

Take notice that the plaintiff in the above-entitled action under rule 19 of the Rules of the Circuit Court for the Ninth Circuit, will and does hereby move that the taxation of costs in the above cause made by the clerk of said court on July 16th, 1895, be retaxed and does hereby appeal from the rulings of said clerk on such taxation in disallowing the following items of plaintiff's memorandum of costs, to-wit:

First. To making assays of ores from the ground in controversy for use on the trial, \$48.00.

Second. To paid register and receiver of land office for filing of adverse claim and protest, \$10.00.

Third. To bill of I. Hamburger transcript of testimony taken on trial, \$62.40.

Helena, July 17th, 1895.

H. G. McINTIRE,

Plaintiff's Attorney.

To George W. Sproule, clerk of said court and George A. Clark, attorney for defendant. Served and filed July 17, 1895. Geo. W. Sproule, Clerk.

[Endorsed]: Title of Court. Title of Cause. Appeal and Motion to Retax Costs.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

MONTANA CENTRAL RAILWAY COMPANY,
Plaintiff,

vs.

ACHILLE F. MIGEON, NICHOLAS B. RING-
ELING and BENJAMIN TIBBEY,
Defendants.

Points on Appeal from Clerk's Taxation.

On its appeal from the clerk's taxation of costs in the above cause the plaintiff submits the following points:

I.

The clerk disallowed the item of \$48.00 paid for assays of ores from the ground in controversy for use on the trial. The action was one involving the construction of U. S. Rev. Stat. sec. 2333 as to what constitutes a "known lode." To ascertain that the value of the lead matter became an important point. It became indispensable to ascertain whether the lode was such as would justify exploitation. This could only be accomplished by assays; they could only be obtained by paying for them, hence the charge is proper.

52 Fed. 395 cited by the clerk to sustain his ruling is wholly inapplicable.

II.

The transcript of testimony taken on the trial was ordered by his Honor Judge Beatty, each party paying one-half thereof. The charge disallowed is for the plain-

tiff's one-half. This transcript was necessary to enable the Judge to rule on the case—in effect it was a transcript made for the purpose of the trial and is filed in the case. The clerk is in error in supposing it was made for convenience of counsel. His Honor will recall that the oral arguments were made the following day after the testimony was closed and long before Mr. Hamburger made this transcript. The charge is a proper one and seems to be contemplated by rule 67.

III.

The clerk disallowed the item of \$10 paid the land office on filing protest against defendants' application for patent. This is not a court cost of the State court, and the clerk is mistaken in that regard. The action is one founded on U. S. Rev. Stat. secs. 2325, 2326. Under these sections a protest must be filed—the land office fees must be paid therefor, consequently the charge is a proper one. If one can collect a clerk's fee on beginning a suit it would seem he should be allowed a fee that had to be paid before this suit could be brought.

It is respectfully submitted all the charges disallowed were proper, and that the clerk's action should be overruled.

Helena, July 17, 1895.

H. G. McINTIRE,
Plaintiff's Attorney.

[Endorsed]: Title of Court. Title of Cause. Appeal. Filed July 17, 1895. Geo. W. Sproule, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

MONTANA CENTRAL RAILWAY COMPANY,
Plaintiff,

vs.

A. F. MIGEON, BENJAMIN TIBBEY and N.
B. RINGELING,
Defendants.

Appeal from Taxation.

Please take notice that the defendants in the above-entitled action hereby appeal from the rulings of the clerk of said court on the taxation of costs in the above-entitled case made July 16, 1895, in allowing the following items of plaintiff's costs in said action and on Monday, August 5, 1895, or so soon thereafter as counsel may be heard, at 10 o'clock A. M., at the courthouse in Helena, Montana, move said court to retax said costs, for the following reasons:

1. Said memorandum of costs should be disallowed because not filed in accordance with rule 17 of said court.

2. The mileage of the witnesses D. S. Scott, D. Brennan, J. C. E. Barker, J. McLaggin, and R. M. Cobban, because they were not subpoenaed as witnesses and attended voluntarily and their mileage for travel is not proper costs under the law.

3. The bill of T. T. Baker for survey and map of ground is not an item of costs allowed by law.

4. The entry fee of \$5 in State court is not an item of costs allowed by law.

5. The bill of I. Hamburger for stenographic work in court is not legal costs. It was performed by order of the Court. This is an equity case and costs are discretionary, and in the exercise of its discretion under the circumstances of this action, should be disallowed by the Court.

6. As a jury was waived in this action the docket fee allowed should be \$10 instead of \$20 as allowed by the clerk.

Butte, July 18, 1895.

GEORGE A. CLARK,
Solicitor for Defendants.

To George W. Sproule, clerk of said court, and to H. G. McIntire and A. J. Shores, solicitors for plaintiff.

[Endorsed]: Title of Court. Title of Cause. Appeal from Taxation. Filed July 10, 1895. Geo. W. Sproule. Clerk.

In the Circuit Court of the United States, District of Montana.

MONTANA CENTRAL RAILWAY COMPANY,
Plaintiff,

vs.

ACHILLE F. MIGEON ET AL,
Defendants.

Opinion on Taxation of Costs.

BEATTY, District Judge.

Plaintiff filed its memorandum of costs on July 13, 1895, and from papers now before me it appears that the only objection made by defendants before the clerk was to the following items:

Item 1	To attending taking of 12 depositions each \$2.50	\$30 00
Item 2	To paid T. T. Baker making survey map of ground in controversy	25 00
Item 3	Paid entry fee in State court	5 00
Item 4	Making assays of ore from ground in controversy	48 00
Item 5	To bill of I Hamburger, transcript of testimony taken on trial	62 40
Item 6	Paid Register and Receiver in U. S. Land-office	10 00

Of which the clerk allowed the first three, and disallowed the last three. On July 17th the plaintiff appealed from the ruling of disallowance, and on the next day the defendants also appealed from the allowance of any items upon the ground that the cost bill was not filed in accordance with rule 17, and assigned special objec-

tion to the mileage of witnesses and attorneys, docket fee, and to some other items to which they had previously made objection before the clerk.

That the cost bill was filed within the time required by rule 17, I cannot determine from the facts before me, for it does not appear when plaintiff had notice of the decision in the cause, but the cost bill does not contain any notice of the time when it will be considered, nor any evidence of its service upon the defendants as required by rule 17. However, rule 18 requires the party objecting to the costs to make his objections known to the clerk at the time of the hearing. Only the objections then made should be considered on appeal from the clerk's ruling and all others held as waived, which leaves for present consideration only the ruling of the clerk upon the six items above named to which proper objections had been made.

While I have some doubt of the correctness of his ruling in disallowing entirely the item for assaying, I have concluded to affirm his ruling in all particulars except as to the item of \$62.40 for transcript of the testimony. One copy of it was printed for use of the court and is now with the files of the cause as a part thereof, and should be paid for as costs in the case, but as I learn that the reporter made other copies, at same impression, for the use of counsel, the costs should be apportioned, and instead of \$62.40, there is allowed for such transcript the sum of forty dollars (\$40).

Dated July 31, 1895.

JAS. H. BEATTY,

Judge.

Notice of Location.

PAY STREAK LODE CLAIM,
SUMMIT VALLEY MINING DISTRICT,
DEER LODGE COUNTY, TERRITORY OF MONTANA.

Notice is hereby given, that the undersigned has, this 22nd day of April, A. D. 1878, located (1050) one thousand and fifty feet in length and (600) six hundred feet in width, on the above-named quartz lode mining claim, bearing gold, silver and other metals, situate in the mining district, county and Territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to-wit:

Beginning at the discovery shaft, thence easterly (525) five hundred and twenty-five feet, thence southerly (300) three hundred feet, thence westerly (1050) one thousand and fifty feet, thence northerly (600) six hundred feet, thence easterly (1050) one thousand and fifty feet, thence southerly (300) three hundred feet, thence westerly to place of beginning. Bounded on the east by the Morning Star lode claim, and on the west by the Angelika lode claim.

Comprising 525 feet in an easterly direction and 525 feet in a westerly direction from the center of discovery shaft, and including surface ground 300 feet in width on each side of the center of said lode.

The corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced.

A copy of this notice was posted at the discovery shaft on said claim on the 23d day of April, 1878.

The adjoining claims are _____.

DANIEL ZENN,
JOHN O. McEWAN,
Claimants.

MONTANA TERRITORY,)
Deer Lodge County.) ss.

The undersigned, being first duly sworn on oath, says that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at discovery shaft thereon on the day therein stated.

DANIEL ZENN.
JOHN O. McEWAN.

Subscribed and sworn to before me this 24th day of April, A. D. 1878.

CALEB E. IRVINE.
Notary Public.

Filed for record April 25th, A. D. 1878, at 7 o'clock P. M.

[SEAL]

H. S. CLARK,
County Recorder.

STATE OF MONTANA,)
County of Silver Bow.) ss.

I, C. Q. Johnson, County Clerk and Recorder of said county, do hereby certify that the annexed instrument

is a full, true, and correct copy of the original instrument, as recorded at page 366, in book 5 of Quartz Lode, records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed, this 23d day of April, 1895.

[SEAL]

C. Q. JOHNSON,
County Clerk and Recorder.
By A. E. Whipps, Deputy.

UNITED STATES OF AMERICA. }
DISTRICT OF MONTANA. } ss.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

THE MONTANA CENTRAL RAILWAY COM- PANY,	}	Plaintiff,
		vs.
ACHILLE F. MIGEON, BENJAMIN TIBBEY and NICHOLAS B. RINGELING,	}	Defendants.

Clerk's Certificate.

I, George W. Sproule, clerk of the said Circuit Court of the United States, for the District of Montana, do hereby certify that the annexed transcript contains a full, true, and correct copy of the memorandum of costs, objection thereto, taxation of costs, appeals therefrom and opinion of court on appeal as the same appear of

record in said cause; and that the annexed notice of location of the Pay Streak lode claim, is a true and correct copy of the original notice offered in evidence in said cause and rejected; that said copies were omitted from the original transcript of record in said cause, and are now forwarded in accordance with stipulation of counsel.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court this 20th day of February, A. D. 1896.

[SEAL]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 276. United States Circuit Court of Appeals for the Ninth Circuit. Additional Record. Appeal from the United States Circuit Court, District of Montana. H. F. Migeon, B. Tibbey and N. B. Ringeling, Appellants v. The Montana Central Ry. Co. Filed January 17th, 1896.

F. D. MONCKTON,
Clerk.

No. 276.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. F. MIGEON, N. B. RINGELING and BEN-
JAMIN TIBBEY,

Appellants,

vs.

THE MONTANA CENTRAL RAILWAY COM-
PANY,

Appellee.

FILED
MAY 22 1896

APPELLANT'S BRIEF.

Appeal from the United States Circuit Court, for the
District of Montana.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

A. F. MIGEON, BENJ. TIBBEY and N. B.
RINGELING,

Appellants,

vs.

THE MONTANA CENTRAL RAILWAY COM-
PANY, a Corporation,

Appellee.

STATEMENT OF THE CASE.

This is a suit in equity to quiet title to two tracts of land, in area 3.67 and 9.60 acres respectively, situated Near Butte, Silver Bow County, Montana.

On July 2, 1877, Charles Colbert made a discovery of a quartz vein upon the premises in dispute and located thereon the Morning Star Lode Mining Claim, 750 feet east and 750 feet west of the point of discovery, and 300 feet on each side of the center of the vein. October 15, 1878, John Noyes and others made a placer location in the vicinity of and including the west 730 feet of the Morning Star Claim, and on December 17, 1878, made application for a patent for the same. Said application did not include any quartz veins or claims known to exist within the limits of the ground covered by the placer location. Final entry was made by said Noyes and others July 14, 1879, and the placer patent was issued to John Noyes July 25, 1880.

The discovery point on the Morning Star claim was between 10 and 20 feet east of the east boundary line of the

placer location. In April of 1879 or 1880 Charles Colbert sold one half of the Morning Star claim to Valentine Kropf and Harvey McKinstry. On January 1, 1882, said Harvey McKinstry located the Childe Harold Quartz Lode claim at the discovery point of the Morning Star claim, extending 1450 feet west and 50 feet east of said point and 300 feet on each side of the center of the vein.

June 20, 1885, Edward McKinstry, the distributee of the estate of Harvey McKinstry, deceased, deeded the Childe Harold claim to the appellants, who have ever since represented the claim as required by law.

July 25, 1887, the two tracts in dispute were deeded by assigns of John Noyes, to the appellee.

On September 26, 1887, appellants filed an application for patent to the Childe Harold Lode claim in the U. S. Land office at Helena, Mont., and the appellee adversed the same.

December 10, 1887, appellee filed this suit to quiet title in the District court of the Second Judicial district of the state of Montana in and for Silver Bow county, and on July 16, 1890, under a provision of the Act of Congress admitting Montana as a state, secured its removal to the Circuit court for the Ninth Circuit District of Montana, and the case was filed there in December 24, 1891. Knowles, district judge of said court having been counsel in the case, was disqualified, and on April 30, 1895, trial was had before Beatty, judge of the District of Idaho, sitting as a chancellor. Decree for appellee, whereupon appellants appealed to this court.

The Noyes placer, M. E. 511, and the Childe Harold claim embrace within their boundaries both tracts in dispute.

The 9.60 acre tract is within the boundaries of the Noyes placer and the Morning Star claim.

The questions involved in the case are:

Was the vein upon which the Morning Star and Childe Harold claims were located a vein or lode known to exist within the boundaries of the placer claim on December 17, 1878 within the meaning of U. S. Rev. Stat., Sec. 2333?

Was the west 730 feet of the Morning Star claim on said date a part of the public domain, subject to entry appropriation or sale as public land, and if not, is not the placer patent void to that extent and as such subject to attack in this action?

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

A. F. MIGEON, N. B. RINGELING and BEN-
JAMIN TIBBEY,

Appellants,

vs.

THE MONTANA CENTRAL RAILWAY COM-
PANY,

Appellee.

SPECIFICATION OF ERRORS

Specification of errors upon behalf of the appellants,
Achille F. Migeon, N. B. Ringeling and Benjamin
Tibbey.

Now come the appellants above named, after decree filed and entered, and say that in the record proceedings in the above entitled cause, and particularly in the decree entered therein. there is manifest error in this, to-wit:

NOTE—Owing to Judge Beattie's limited time in Montana the deposition testimony was not read at the trial, upon the understanding between counsel and the court that exceptions would be allowed to the rulings made upon the objections noted therein. In the opinion no ruling is made upon any of these objections.

—————, Clerk.

The court erred in the admission and rejection of evidence as follows:

1. In rejecting, if it did reject it (see note by clerk) as evidence the original notice of location of the Morning Star Lode claim, "Exhibit A," offered by appellants in their deposition evidence and objected to by appellee, because:

A. Said notice fulfills the requirements of law and is by law made primary evidence of the acts constituting a valid location of a quartz claim.

2. In rejecting, if it did reject it, the deposition testimony of the witness, Charles Colbert, that his reason for sinking shaft "C" 75 feet west of the original discovery on the Morning Star claim was: That he saw at the discovery shaft that the vein ran east and west and that he knew he would strike the lead at shaft "C," because:

A. It was relevant and material evidence showing the extent of the Morning Star vein and its strike, essentials of a locatable quartz discovery and that said lode extended into the ground in dispute in this action.

B. It was admissible evidence to prove, in connection with the admission of John Noyes, the placer locator and patentee, on the trial, that he knew of the Morning Star discovery at or about the time it was made by Charles Colbert, that if he had made such examination of the ground subsequently located by him as placer, as the law requires he would have had personal knowledge that the strike of the Morning Star vein was into said placer ground; and that he is consequently chargeable with such knowledge, actual and constructive.

3. In rejecting, if it did reject it, the deposition testimony of appellant's witness, W. P. Emery, that the results of assays made by him of the Anderson Lode in the vicinity of the Morning Star claim and at about the time of its location, was about 14 ounces in silver and a small amount of gold to the ton, because:

A. Said evidence was brought out by appellee on cross examination of the witness.

B. Such evidence was competent and relevant as tending to prove that at the time of the Morning Star location land in the vicinity was valuable for quartz; that quartz lodes existed there and were known to exist; and as tending to disprove the testimony of appellee's witnesses to the contrary.

4. In rejecting the deposition of appellant's witness, George H. Newkirk, if it did reject it, of his conversation with Charles Colbert at the discovery shaft on the Morning Star in 1877 or 1878, in which Colbert stated that the ground was located and Newkirk said that from what he saw of the quartz he thought it was a good piece of property, because:

A. Said statement by Colbert is admissible evidence as part of the *Res Gestae*, being a declaration made by Colbert concerning his own property while in possession thereof and at about the time of its acquisition by him.

5. In rejecting the evidence of appellant's witness, Valentine Kropf, if it did reject it, of his conversation with Charles Colbert, in which the latter stated that the Morning Star claim was of full size for the reasons given in assignment No. 4.

6. In rejecting as evidence, if it did reject it, Exhibit "D," the affidavit of the performance by Thomas Overland of the representation work on the Childe Harold claim for the year 1886, offered by appellants in connection with the deposition testimony, because: It is by law made admissible evidence.

7. In rejecting, if it did reject it, as evidence Exhibit "E," the affidavit of intention, duly recorded, to hold the Childe Harold claim for the year 1894, offered by defendants in connection with the deposition testimony, because:

A. It is by law made admissible evidence.

8. In rejecting as evidence, if it did reject it, Exhibit "F," the certified copy of the recorded notice of location

of the Childe Harold claim by Harvey McKinstry, the original locator, offered by appellants in connection with the deposition evidence, because:

A. It is by law made admissible evidence.

B. In connection with Exhibits "G" and "H" and the original deed of the Childe Harold claim from Edward McKinstry to the appellants, Exhibit No. 3 it is primary evidence of the title of appellants and of their grantors to the Childe Harold claim.

9. In rejecting as evidence, if it did reject it, exhibit "G" the certified copy of the recorded decree of distribution rendered by the district court of Silver Bow County, Montana, of the estate of Harvey W. McKinstry, the original locator of the Childe Harold claim, distributing the same to Edward McKinstry the grantor of the appellants offered by the appellants in connection with the deposition evidence, because:

A. In connection with exhibit "G" and the original deed of the Childe Harold claim from said Edward McKinstry to the appellants, it is primary evidence of defendant's title to the Childe Harold claim.

10. In rejecting as evidence, if it did reject it, exhibit "H," the certified copy of the recorded deed of the Childe Harold claim from Edward McKinstry to the appellants, offered by the appellants in connection with the deposition evidence, because:

A. It is primary evidence of appellants' title to the Childe Harold claim.

11. In rejecting the evidence of the engineer John Gillie, a witness for the appellants at the trial, exception

taken and allowed by the appellants, as to the results of an examination made by him of several excavations or shafts upon the Childe Harold claim, and assays of ore taken therefrom, said shafts being on a direct line between shafts "A" and "C," the original points of discovery of the Morning Star vein, because:

A. Such evidence is material, relevant and competent to prove that the Morning Star vein justified exploitation and development; that it has been exploited and developed by the appellants at great expense, notwithstanding that their title to the claim has been disputed by this action during nearly the entire time since its purchase by them and such evidence would refute the finding of fact made by the court in its decree: "There does not seem to be any claim that more work than is necessary to hold the Childe Harold claim has been done thereon;" and "There is no evidence to satisfy me that any of the work was done with a view to the development of a valuable mine."

B. Such evidence is corroborative of the testimony of Charles Colbert, the original discoverer and locator of the Morning Star lode, as to its dimensions and strike at the time of its discovery by him in 1877 and that in that year he uncovered the vein in shaft "C," 75 feet west of the original discovery shaft.

12. In rejecting as evidence the certified copy of the recorded notice of location of the Pay Streak Quartz lode claim, offered by the appellants at the trial, said claim having been located in April, 1878 and adjoining the Morning Star claim on the west, because:

A. It is competent and material evidence corroborative of the evidence of appellants' witness, Daniel Zinn, given at the trial, as to the location of the Pay Streak lode claim by him, the date thereof, and that the Morning Star claim adjoined it on the east.

B. As evidence tending to prove by its reference to the Morning Star claim as adjoining it on the east, that in April, 1878, the Morning Star claim was a known located claim, this being prior in time to the date of location of the John Noyes placer.

13. In admitting the evidence of J. E. C. Barker, appellee's witness at the trial, exception taken and allowed by appellants, as to the percentage of mineral or the values of ores necessary to make quartz mining pay in Butte in 1873, and that the Morning Star vein could not then or now be worked at a forfeit, and as to the values of ores taken from the Aurora and Cora mines at about that time, because:

A. Such evidence is immaterial and irrelevant upon any issue involved in this action; the issue here is whether the Morning Star vein discovered in 1877, was a well-defined, mineral-bearing vein which would warrant exploitation or development. No law governing the acquisition of title to quartz mining property requires as an essential the discovery or taking out of ore of such value as will make quartz mining pay, and this principle is expressed in the decree.

14. In admitting the testimony of John Noyes, appellee's witness, at the trial, exception taken and allowed by appellants, that the ground in controversy was compara-

tively of greater value for placer than for quartz mining in 1877 and 1878, because:

A. Said Noyes did not testify, nor is there any testimony in the record, proving or tending to prove, that the ground in controversy or any part of it had ever been worked or located as placer ground prior to or at the time of, the Morning Star discovery and location in July, 1877.

B. Said Noyes' testimony does not show that any discovery of placer mineral deposits was ever made at the times mentioned, on the ground in dispute and therefore his testimony as to its value as placer ground is incompetent as opinion evidence not founded upon facts in evidence.

15. In admitting the testimony of De Grasse Palmer, appellee's witness at the trial, as to the per centage of mineral or the values of ores necessary to make quartz mining pay in 1878, and that the ground in dispute was more valuable in that year for placer than for quartz, because:

A. Such evidence is incompetent and immaterial for the reasons stated in assignments Nos. 13 and 14.

16. In admitting the testimony of L. S. Scott, appellee's witness at the trial, as to the selling price of copper ores at the Butte smelters in 1878 and that the ground in dispute was in that year of comparatively greater value as placer than as quartz ground, because:

A. Such testimony is incompetent for the reasons stated in assignment No. 14.

17. In admitting the testimony of Albert W. Noding and D. G. Bronner, plaintiff's witnesses at the trial, that the ground in dispute was of comparatively greater value as quartz than as placer in 1878, because:

A. For the reasons stated in assignment No. 14, such testimony is incompetent.

18. In admitting the testimony of John McClaggin, appellee's witness at the trial, that in 1878 the ground in dispute was of comparatively greater value for placer than for quartz purposes; that in that year the expenditure of time and money to work ore carrying 30 oz. silver and \$1 in gold to the ton would not be justified and that smelter charges for treating ore in Butte in that year were \$60 per ton, because:

A. For the reasons stated in assignments Nos. 13 and 14, such testimony is incompetent and immaterial.

19. In admitting the testimony of H. Garfof, appellee's witness at the trial, exception taken and allowed by appellants, that copper ore of 27 per cent. value would not pay to work in Butte in 1878, because:

A. For the reasons given in assignment No. 13 such evidence is incompetent and immaterial.

20. In admitting the testimony of W. F. Cobban, appellee's witness at the trial, exception taken and allowed by the appellants, as to the value of the ground in dispute for town lot purposes in 1882, because:

A. Such testimony is irrelevant to any issue involved in this action.

21. There is manifest error in the decree in holding that the proposition of the cancellation of the Government patent to the ground in dispute is involved in this action, because:

A. The annulment or cancellation of a patent from the United States to land, can be effected and the proposition only by a suit in equity brought in the name of the United States and for that purpose where the patent is voidable and not void and the United States is not a party to this action.

B. The question of the cancellation of a patent cannot arise as to lands never granted by the patent or purporting to be granted thereby. The theory of the law with reference to placer patents is that they do not convey or purport to convey, any veins or lodes known to exist within the limits of the ground applied for at the date of application, or any quartz claims legally located upon such a vein or lode prior to such application; in the one case the lode or vein with the adjacent ground to the extent of 25 feet on either side of the center of the vein; in the other the located claim to the extent of the width as located not exceeding 300 feet on either side of the center of the vein located upon, are excepted from the placer patent, unless expressly mentioned in the application for patent, as effectually as though the exception were expressed in the patent by meets and bounds. The applicant for patent is conclusively presumed to waive all claims to such a vein or lode or located claim unless he expressly includes it in his application. The law governing the cancellation of a patent applies only

in cases where the patent purports to convey and does convey, the land as to which cancellation of the patent is sought, but where the issuance of the patent was secured by fraud. In this action if it is found as a fact that a quartz claim was located upon the ground in dispute and that such location was made upon the discovery of a vein prior to or at the time of the application for the Noyes placer patent, and said application did not include said located claim or known vein, the placer patent never conveyed, or purported to convey, such known vein or located claim. The court finds as a fact in its decree and opinion that the Morning Star claim was located July 2, 1877, and that a vein or fissure was developed in the discovery shaft and that the Noyes placer, located October 15, 1878, included 730 feet of the west end of the Morning Star claim. Upon this finding it follows as a matter of law that the Morning Star claim was a valid existing claim up to and including December 31, 1878, and that an inchoate title to the same had been withdrawn from the United States by the locators and their assigns. The Noyes placer application did not include the Morning Star vein or claim, and therefore neither said application nor the patent issued thereon could include said 730 feet of the Morning Star claim. The title thereto remained in the government, in trust for the claimants under the existing location and their assigns upon the perfection of their title or subject to subsequent appropriation by location, upon abandonment or forfeiture.

C. Even if the theory of the law stated in "B" is erroneous and the Noyes placer patent does purport to con-

vey the ground within the limits described therein, the proposition of cancellation cannot apply to a patent which is absolutely void. Upon the findings of fact by the court as above stated, the placer patent as to the west 730 feet of the Morning Star claim would be void for the reason that at the time of the application for said patent said west 730 feet of the Morning Star claim was property and the power to convey it had been withdrawn from the United States and a patent purporting to convey it would be an absolute nullity. The title remained in the locators and their assigns to be perfected upon the performance by them of the acts required by law and upon abandonment or forfeiture by them reverted in the United States subject to subsequent location. As the Court further finds in its opinion, as a fact, that the Childe Harold claim was on January 1, 1881, located at the discovery point of the Morning Star claim, and that a part of it is included in the portion of the placer conveyed to the plaintiff. It follows that the defendants are entitled to a decree for that part of the Childe Harold claim included within the limits of the Morning Star claim and that portion of the placer conveyed to the plaintiff:

22. There is manifest error, in the decree and opinion of the Court, in its finding of fact therein contained, that the appellants "have held the Childe Harold claim since 1835 without any effort to develop it into a valuable property," and that "no work was done with a view of the development of a valuable mine," because:

A. Such finding is contrary to the uncontroverted evidence of the appellants, in the record, that the representation work has been done upon the claim since it was

conveyed to the appellants, except in the years 1893 and 1894, when the affidavits of intention to hold the claim were filed as required by law.

B. Such finding is inequitable and contrary to the facts disclosed by the record that the title to the premises in dispute has been in litigation since the commencement of this suit in 1887.

C. Such finding is not pertinent to any question of law involved in this action.

D. Such finding is contradictory to and inconsistent with the evidence of the performance of representation work and the finding of fact elsewhere in the opinion that "there seems to be no claim made that more work than was necessary to hold the same (The Childe Harold) has been done thereon." Representation work is development work and there is no rule of law which requires that development work or exploration under the constructive phrases, "'Justifying,' 'Exploration,' 'Exploitation,' or 'Expenditure'" as used in the opinions of the Courts, shall be more in extent or greater in value than the representation work required by law to hold a quartz claim.

23. There is manifest error in the decree and opinion of the Court in holding that the propositions "what is a known vein as defined by Sec. Rev. Stat. 2,333," and "whether such a known vein existed within the boundaries of the placer claim on December 17, 1878, the date of the application for patent therefor" are involved in this action, because:

A. Upon the findings of fact in the opinion stated ante with respect to the location of the Morning Star claim and the subsequent location of the Noyes placer covering the west, 730 feet of said claim the law with respect to "known veins" is eliminated from the case and the question of law presented is, "was the placer patent void as to the said 730 feet of the Morning Star claim for the reason that at the date of application therefor said portion was held by prior lawful appropriation as a claim was property, and the government had no power to convey it."

24. There is manifest error in the opinion and decree of the Court in holding "that the placer claim includes a part of what was the Morning Star and was located before the latter had been forfeited, is an objection that cannot be considered in a collateral attack upon a patent," because :

A. If the Morning Star was at the date of Noyes application a known claim and John Noyes had actual or constructive notice of its existence, the placer patent did not convey or purport to convey said 730 feet of the Morning Star claim. A patent is not collaterally attacked as to something it does not purport to grant.

B. If the placer patent did purport to convey said 730 feet of the Morning Star it was to that extent void and a void patent is subject to collateral attack. Said 730 feet, being embraced in a "known claim," was excepted from the patent by Act of Congress and by the terms of the instrument itself.

25. There is manifest error in the finding of fact in the decree and opinion with reference to the location in Butte and vicinity of mining claims for townsite and other

purposes without the sanction of law and the manifest consideration thereof to the disadvantage of the appellants, because :

A. Such finding is not pertinent to any issue in this action.

B. Such finding is contradictory of the finding of fact elsewhere in the opinion that the Morning Star claim was located upon a vein.

C. The only evidence in the record to support such finding was that of appellee's witnesses that they might locate the ground in dispute as mining ground, for surface purposes, in violation of law and upon false affidavits and in fraud of the United States, and detracts from the competency of their evidence to the advantage of appellants.

26. There is manifest error in the opinion and decree in the finding of fact that the Morning Star claim was abandoned, because :

A. There is no evidence in the record that it was ever abandoned by Harvey McKinstry or Charles Colbert.

B. Such finding is contradictory to the finding contained elsewhere in the opinion that the Morning Star claim was located upon a vein July 2, 1877. If it was so located at said time the law preserved its existence as a valid existing claim up to and including December 31, 1878, subsequent to the date of the placer application.

C. Even if it was abandoned after said date, the Noyes placer patent did not convey any part of it. Said patent could convey no more than Noyes asked for in

his application and he did not ask for any part of the claim as such and the law conclusively presumes that it was excepted from the application. If it was subsequently abandoned it became a part of the public domain subject to relocation.

27. There is manifest error in the decree in the application of the cases of *Davis vs. Wiebold* 139 U. S. 537, *Dower vs. Richards* 151 U. S. 558, *Deffenbach vs. Hawke* 115 U. S. 392 to the case at bar adversely to defendants. Those cases arose between claimants of the same land as mineral upon the one hand and purposes other than mineral on the other. They were dependent upon the construction of Rev. Stat., Sec. 2,392. Here the parties both claim title to the land as mineral land.

28. Where in error in the decree in adjudging for plaintiff according to the prayer of the complaint, because :

A. There is no evidence in the record of any damage resulting from occupation of the premises.

29. There is manifest error in the opinion of the Court in holding that "the defect that the placer claim covered a part of what was the Morning Star claim and was located before the latter was forfeited is cured by the issue of the placer patent," because :

A. For the reasons stated ante the placer location was an absolute nullity and void as to the ground covered by the Morning Star claim. The issue of a patent cures defects in a location, but cannot help an absolutely void one.

30. There is manifest error in the finding in the decree that the Morning Star vein was not a known vein on December 17, 1878, and that on said date no known vein or lode existed within the limits of the Noyes placer claim, because :

A. Such findings are not supported by the evidence and are contrary to the evidence contained in the record that the Morning Star vein was on July 2, 1877, known to exist in the premises in dispute and has ever since been known to so exist and was on said date a located claim and existed as such to January 1, 1879.

31. There is manifest error in the order of the Court contained in the record taxing costs, because :

A. Said costs were not legally taxed for the reasons stated in defendants appeal from the order of the clerk taxing the same contained in the record.

B. Plaintiff's witnesses were not summoned nor did they file affidavits as required by the rules of the Court.

Wherefore the defendants pray that the decree of the Circuit Court for the Ninth Circuit, District of Montana, be reversed, with directions to said Court to enter a decree in favor of the appellants for the Childe Harold Quartz Lode Claim, or so much of the same which is within the limits of that portion of the Noyes placer claim conveyed to the appellee and the original Morning Star claim and for costs.

GEORGE A. CLARK,

Solicitor for the Appellants.

BRIEF OF ARGUMENT.

The recorded location notice of the Morning Star claim, Exhibit "A," page 43, is admissible.

A. The lower Court admitted it. Page 519.

B. It was admitted by stipulation. Page 25.

C. It meets the requirements of law with reference to a recorded notice of location.

"Any person or persons who shall hereafter discover any mining claim * * * shall within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery is made, a declatory statement thereof in writing under oath before some person authorized by law to administer oaths describing said claim in the manner provided by the laws of the United States.

Stat. Mont. Act, Feb. 11, 1876.

Mont. Stat., 1879, Page 590, Sec 873:

"A copy of any record or document or paper in the custody of a public officer of this territory or the United States within this territory, certified under the official seal * * * "May be read in evidence in an action or proceeding in the courts of this territory in the like manner and with the like effect as *the original could be if produced.*"

Mont. Stat., Act February 16, 1877.

Mont. Stat., 1879, Page 139, Sec. 525.

Congress has legislated upon the manner in which the public mineral lands of the United States may be appropriated; a state statute which imposes additional

requirements, as to an oath, inconsistent with existing federal law, cannot stand.

U. S. Rev. Stat., Title XXIII, Chap. 1, Secs. 1851, 1891.

U. S. Constitution, Art. IV, Sec. 3

U. S. Constitution, Art. VI, Par. 2.

U. S. Constitution, Amendment X.

U. S. Rev. Stat., Sec. 2324.

Choteau vs. Gibson, 13 Wall., 99.

Hauswirth vs. Butcher, 4 Mont., page 309.

Wenner vs. McNulty, 7 Mont., page 36.

Hoyt vs. Russell, 117 U. S., page 401.

Davidson vs. Bordeaux, 15 Mont.; page 251.

McKowan vs. McClay, 16 Mont, 236.

Preston vs. Hunter, 67 Fed. Rep., page 996.

A. Even if defective it would still be admissible to show constructive notice of the existence of a known vein within the limits of the ground in controversy.

Brownfield vs. Bier, 15 Mont., page 403.

Charles Colbert's testimony as to his reasons for sinking 75 feet west of his original discovery on the Morning Star, is admissible (page 47) for the reasons stated in par. 2 of the specification of error.

W. P. Emery's testimony as to the results of assays of the Anderson Lode, (page 146) is admissible for the reasons stated in par. 3 of the Specification of Errors.

George Newkirk's testimony as to his conversation with Charles Colbert and the latter's statement that the ground was located (page 173) is admissible as part of the Res Gestate.

Mont. Stat., Feb. 11, 1876.

Mont Stat. , 1870, page 153, Sec. 604.

“Where also the declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence as part of the transaction.”

Valentine Kropf’s testimony as to Colbert’s statement of the size of his claim (page 110) is admissible as part of the *res gestae*.

See Mont. Stat., ante.

Exhibits “D” and “E” (pp251-253) affidavits of rep. and performance of annual work on Childe Harold claim are admissible.

Mont Stat , Act Feb 27, 1885.

Rev. Stat Mont , 1857, P. 1056, Sec. 1486

“The affidavit or affidavits named in the preceding sections, or copies thereof duly certified by the recorder of the county shall be duly received and admitted in evidence in any court of justice in this territory and be prima facie proof of the facts recited therein.

Act of Congress, July 18, 1894 (Amend 2424.)

Exhibit “F” (page 255) recorded notice of Childe Harolde claim is admissible.

Mont Stat , 1879, pp 590 and 139, Secs. 873 and
and 525 ante.

Exhibit “G” (page 259) cert. copy decree distribution est Harvey McKinistry, is admissible.

Mont Stat., 1879, P. 139, Secs. 525 and 526 and
p. 193, Sec 5.

Sec 526. * * * "The several Probate courts of this territory shall be courts of record."

Sec. 525. "A copy of any record, document or paper in the custody of a public officer of this territory * * * "Certified under the official seal * * * may be read in evidence in an action or proceeding in the courts of this territory."

Sec. 5. "The seal of the court need not be affixed to any proceedings except * * * "To the authentication of a copy of a record * * * "For the purpose of being used as evidence in another court."

Exhibit "H" (page 264) certified copy of deed Childe Harold claim to defendants is admissible.

Mont. Stat., Sec. 525 ante.

John Gillie's testimony as to the results of examination of and assays from several shafts or excavations upon the Childe Harold lode (pp. 281 and 304) is admissible for the reasons stated in Par. 2 of the Specifications of Error and as tending to prove that the Morning Star vein warranted exploitation and was exploited.

The certified copy of the Pay Streak Lode claim, p. 574, is admissible, for the reasons stated in Par. 12 of the Specifications of Error and as corroborating the testimony (Page 355) of Zinn the locator.

The testimony of Barker, Noyes, Palmer, Scott, Bronner, McClaggin and Garfof (par. 13, 15, 16, 17, 18 and 19 Specification of Errors) as to the value of ores to make quartz mining pay in 1878 (p. 418, 440, 451, 460, 472, 479, 485, 486 and 490) is inadmissible, being irrelevant to the issues.

No. Noonday Min. Co. vs. Orient Min. Co. 1

Fed., rep. 531, 6 Sawyer 300.

Brownfield vs. Bier, 15 Mont. 409.

Shreve vs. Copper Bell Co., 11 Mont. 309.

The testimony of Noyes, Palmer, Scott, Nodding, Bronner and McClaggin (Spec. Par. 14, 15 and 18) pp. 439, 451, 460, 465, 473 and 479 as to the comparative value of the ground in controversy as placer or quartz in 1878 is incompetent. There is no evidence in the record of any placer mining having been done on said ground prior to July 2, 1877. The witnesses do not qualify themselves by testimony as to what its value was as placer.

Brownfield vs. Bier ante.

The testimony of W. F. Cobban (p. 495) as to the value of the ground for town lots in 1882 is incompetent and irrelevant as to the issues in this case.

ERRORS IN DECREE.

The proposition of the annulment of the government patent to the ground in controversy (p. 520) is not involved.

A patent can be annulled by bill in equity brought in the name of the United States.

19 Am. & Eng. Ency. of Law. Page 350 and Note 1.

The Noyes patent is void as to known veins within the placer ground not applied for and as to the portion of the Morning Star claim within the placer boundaries, because at the date of the Noyes application that portion had been withdrawn from the public domain and the government had no power to convey it.

U. S. Rev. Stat., Sec. 2333.

19 Am. & Eng. Ency. of Law, pp. 350, 353 and 354
and notes.

Morton vs. Nebraska, 21 Wall, 660.

Belk vs. Meagher, 104 U. S., 279.

Noyes vs. Mantle, 127 U. S., 348 and 5 Pac. 864.

Renshaw vs. Switzer, 13 Pac., 127.

Shepley vs. Cowan, 91 U. S., 338.

Eureka Case, 4 Sawyer, 317.

Stark vs. Storrs, 6 Wall, 418.

Forbes vs. Gracy, 94 U. S., 762.

Steel vs. Smelting Co., 106 U. S., 450, 459.

Richmond Min. Co. vs. Rose, 114 U. S., 576.

Smelting Co. vs. Kemp, 104 U. S., 647.

Tallbot vs. King, 6 Mont., 108, 111, 112.

Silver Bow Co. vs. Clark, 5 Mont., 378.

Robinson vs. Smith, 1 Mont., 416.

Sherman vs. Buick, 93 U. S., 209.

Stoddard vs. Chambers, 2 Howard, 284.

Easton vs. Salisbury, 21 Howard, 428.

Reichart vs. Felps, 6 Wall, 160.

Patterson vs. Tatum, 3 Sawyer, 164.

“There does not seem to be any claim that more work than that necessary to hold it (Childe Harold claim) has been done thereon. “There is no evidence to satisfy me that any of the work was done with a view to developing a valuable mine.” (Page 530).

There is no rule of law requiring defendants to do either. Defendants were only required to represent the claim. This they have done.

Pages 251, 253, 389 to 410.

U. S. Rev. Stat., Sec. 2324.

The Morning Star claim was a valid and existing claim and as such was property withdrawn from the public domain and the control of the United States government up to and including December 31, 1879.

Supp. U. S. Rev. Stat., 1874-1891, p. 276.

Record pp. 85, 113, 115, 319.

Belk vs. Meagher, 104 U. S., 279.

The comment of the Court on the practice of locating mining claims in the vicinity of Butte City for their surface (p. 530) evidently considered by the Court to defendant's prejudice was error. All the testimony upon that subject came from plaintiff's witnesses, who swore that they "might locate the Childe Harold claim for town lot purposes."

Pages 450, 452, 495, 514, 515.

Such testimony is an admission that they would commit perjury and perpetrate a fraud upon the United States and should impeach their entire testimony.

There is no evidence that the Morning Star claim was abandoned. Pages 519, 530. The evidence is that it was not abandoned at all, or at least not before January 1, 1880.

Pages 85, 86, 93, 319, 113 and 255.

The cases of Davis vs. Wiebold, 139 U. S., 537, Dower vs. Richards, 151 U. S., 558, and Deffenbach vs. Hawke, 115 U. S., 392, (pp. 525 and 528) do not apply to the issues in this action.

See facts of above cases.

The Morning Star vein, or lode, was "known to exist" within the meaning of the term as used in Sec. 2333 of the Revised Statutes of the United States to except it from the operation of the placer patent on the date of application therefor. When is a vein or lode "known to exist" within the meaning of the statute?

Noyes vs. Mantle, 5 Mont., 856.

Noyes vs. Mantle, 127 U. S., 348.

Stevens vs. Williams, 1 McCrary, 480.

Iron Silver Mining Co. vs. Mike and Starr Mining Co., 143 U. S., 396.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.

Iron Silver Mining Co. vs. Cheeseman, 116 U. S., 538.

Book vs. Justice Mining Co., 58 Fed., Rep. 120.

Brownfield vs. Bier, (Mont.), 38 Pac., Rep.

Shreve vs. Copper Bell Mining Co., 11 Mont., 309.

Burke vs. McDonald, (Idaho), 29 Pac., Rep. 96.

North Noonday Mining Co. vs. Orient Co., 6 Sawyer, 299.

Eureka Mining Company vs. Richmond Mining Co., 4 Sawyer, 302.

Jupiter Mining Co. vs. Bodie, 2 Fed., Rep. 675

Mining Co. vs. Campbell, 16 Morrison, Min. Rep. 218.

Harrington vs. Chambers, 3 Utah, 94.

The time when the vein or lode within the placer must be "known to exist" in order to be excepted from the grant of the patent, is by section 2333, the date of application for the patent, which in the case at bar was December 17, 1878.

Iron Sil. Min. Co. vs. Mike and Starr Co ,
143 U. S. 394.

The term "known vein" in section 2333 is not synonymous with "Located claim," but refers to a vein or lode whose existence is known as contradistinguished from one which has been appropriated by location.

Mike and Starr case and Brownfield vs. Bier.

Sullivan vs. Iron Min Co., 143 U. S., 431 ante.

The court below was in error in holding (page 522) that the requisites of a vein which would justify a location under Sec. 2320 are different from those applied to a "known vein" under Sec 2333. If any of the late decisions seem to imply to the contrary, they are in derogation of the spirit and letter of Sec. 2333, which reads * * * "And where a vein or lode such as is described in Sec 2320, is known to exist, etc."

What constitutes a vein or lode within the meaning of 2320. Justices Field and Miller, Judges Sawyer, Hallet and Hawley have all given practically the same definition. Mr. Justice Miller's, in Mining Co. vs. Cheeseman, 116 U. S. 535, approves in these words. "We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us:" the following:

"A lode or vein is a body of mineral or mineral bearing rock within well defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral bearing rock and the boundaries. With either of these things

well established very slight evidence may be accepted as to the existence of the other * * * "On the other hand, with well defined boundaries, very slight evidences of ore within such boundaries will prove the existence of a lode."

Eureka case—Mike and Starr case.

Noonday Co vs Orient Co.

Jupiter Co. vs. Orient Co.

Stevens vs. Williams, 1 McCrary, 488.

Book vs. Justice Min. Co.

Shreve vs. Copper Bell Co.

Burke vs. McDonald.

Harrington vs. Chambers, all cited ante.

Not one of the appellee's witnesses denies the existence of the requirements of these definitions in the discovery excavations made by Charles Colbert on the Morning Star claim in 1877.

See record, rebuttal evidence.

In the case at bar not only was a vein "known to exist" prior to the dates of the placer location and application, but a claim had been located upon it, and Mr. Noyes, the placer applicant, had not only constructive knowledge of this fact, but personal knowledge of said vein and claim.

See rebuttal evidence, pp. 437, 438 and 442.

There is no equity in favor of the appellees as innocent purchasers. They had notice of an adverse claim through the recorded declaratory statement of the Child Harold claim.

Particular attention is called to *Mantle vs. Noyes*, 127 U. S., cited ante. That case is identical as to facts and dates with the case at bar.

The case of Hauswirth vs. Butcher, (Montana, cited in the brief), ought to dispose of the question as to the sufficiency under state law of the affidavit of verification of the Morning Star recorded notice of location. In that case the lode claim was located in May, 1877, in Deer Lodge County, Montana, and the recorded declaratory statement was exactly the same in respect to the verification affidavit as the Morning Star notice in this case. In that case the Supreme Court of Montana sustained the notice as sufficient on the ground that most of the notices recorded in Silver Bow and Deer Lodge counties were verified in the same way and applied the maxim "Communis Error Facit Jus."

Hauswirth vs. Butcher, 4 Mont., 299.

NO. 276.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit.

F. MIGEON, BENJAMIN TIBBEY, and
N. B. RINGELING,

Appellants.

VS.

THE MONTANA CENTRAL RAILWAY
COMPANY, a Corporation,

Appellee.

Brief of Argument for Appellee.

Filed from the United States Circuit Court, for the District
of Montana.

TRIAL PTG. CO. GREAT FALLS, MONT

FILED
JUN 1- 1896

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Appellants' Specification of Errors, 1 to 10 inclusive.

The Appellants have made a specification of thirty-one errors. The record does not disclose any rulings to which specifications 1 to 10 inclusive can apply. On page 4 of appellants' brief, and at the bottom of page 538 of the printed transcript of the record, is an un-

signed "note" with the word "Clerk" appended thereto, which is probably intended to be explanatory of these specifications of error. This note is no part of the record, and if the statement contained therein is true it does not appear that any steps were ever taken by the appellants to avail themselves of the understanding therein set forth. There is no record by which it is shown to this court what rulings, if any, were made by the court below with respect to any of the matters referred to in these ten specifications of error, and we fail to see how this court could determine from this record that the court below erred with respect to any of the matters so complained of; indeed, the appellants do not complain that there was any error committed in ruling upon any of the objections referred to in these ten specifications of error. It does not appear from the record, nor is it claimed by the appellants, that the court below sustained any of the several objections interposed by the appellee and referred to in these specifications, or that it overruled any of the objections made by the appellants. We think it therefore unnecessary to consider whether there would, or would not, have been error if the court had sustained any of the objections referred to.

Specifications No. 13 to 20 inclusive.

Specifications numbered 13 to 20 inclusive relate to errors alleged to have been committed by the court in receiving testimony against the objection of the appellants. The rulings referred to in these assignments are treated, in behalf of the appellants, as if they had been made upon the trial of an action at law before a jury, and it is apparently considered that if any of the same were technically erroneous the decree would, on this account, need to be reversed.

But, if evidence was improperly received, this of itself would be no ground for reversing the decree. This being a chancery cause, the true inquiry should be whether or not there is competent evidence in the record, taken in connection with the pleadings, to sustain the decree that was entered.

See *Merchants' National Bank vs. Greenhood*, 41 Pac. Rep., at page 267, and cases there cited and reviewed; also

Holmes vs. State, 18 So. Rep., 529;

Scroggin vs. Johnston, 64 N. W. Rep. 236, and cases there cited:

Mammoth Mining Co. vs. Salt Lake Foundry & Machine Co., 14 Sup. Ct. Rep., 384.

But upon the merits the evidence objected to was

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Mammoth Mining Co. vs. Salt Lake Foundry & Machine Co., 14 Sup. Ct. Rep., 384.

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admissible. In the case of Iron Silver Mining Co. vs. Mike & Starr Gold & Silver Mining Co., 143 U. S., in considering what constitutes a known vein so as to exclude the same from the placer patent, the court says:

“It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify the designation of known veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and to justify their exploitations.”

At page 405, in the same opinion, the court says:

“The amount of ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one that justified exploitation and working.”

Specification No. II.

Rule No. 24 of this court requires that, in case where the error alleged is the admission or rejection of evidence, the specifications shall quote the full substance of the evidence admitted or rejected, and further that, in the brief of argument, there shall be a reference to the pages of the record relied upon in support of each point.

This specification does not conform to the rule in that there is no quoting of any evidence admitted or rejected upon which the specification rests. The testimony of the witness Gillie covers altogether more than thirty pages of transcript. On page 23 of the brief there is a reference to pages 281 and 304 of the transcript as supporting this assignment of error. At page 281 it appears that objection was made to some such testimony as is referred to in this specification of error, but there does not appear to have been any ruling upon the objection, and in fact the question to which objection was made was withdrawn by the appellants. If we search the whole record we do not find that the court ever sustained any objection by which evidence was excluded on the part of the witness Gillie, such as Mr. Clark, at page 304 of the transcript, assumes was excluded. It would appear from the record that the counsel for appellants excepted to a ruling that the court never made.

The above sufficiently disposes of this specification; but, if the whole record be examined, it will be found that the examinations made by Mr. Gillie had been recently made, and that the prospect holes referred to had been recently sunk,—at least many years after the application for placer patent. Inasmuch as the issue in

this case relates to the existence of a "known lode" at the date of the application for placer patent, namely December 17, 1878, we do not see how the exclusion of evidence, touching recent discoveries within the limits of the land involved, could prejudice appellants.

The remaining assignments of error are largely in the nature of an argument in opposition to the legal views expressed by the court below in the opinion filed.

The decree of the court is shown at page 532 of transcript. It there appears that the court found as facts:

"That the plaintiff is the owner of, in the possession of, and entitled to the possession of all and singular the premises set out and described in the complaint herein, and hereinafter described.

"That said premises constitute and are a portion of mineral entry No. 511 for which application for patent from the United States was duly made upon December 17, 1878, and for which a United States patent was duly issued to the applicants therefor on July 28, 1880.

"That at the time said application for patent there was no lode of quartz containing gold, silver, copper or other metals known to exist within the exterior boundaries of said mineral entry No. 511.

“That all and singular the averments of plaintiff’s complaint and replication herein are true, and that the averments of the answer of the defendants herein inconsistent therewith are not true, and that plaintiff is entitled to a decree as prayed for in its complaint herein.”

Upon this finding of facts the court granted the relief prayed for in the complaint.

If this finding of facts is sustained by the evidence in the case there can be no doubt that the court was justified and indeed required to grant the relief which was prayed for.

There is no serious attempt on the part of the appellants to show that the finding of facts is unsupported by the evidence. It is to be inferred, from the specifications of errors made, that the appellants believe that the court might have reached a different conclusion or finding, as to the existence of a “known lode” at the time of the application for a placer patent, if it had not entertained certain views as to the law, which are thought by the appellants to be erroneous. It is true that in the opinion filed (found at page 519 of the transcript) the court discusses at some length the question as to what constitutes a “known lode” within the meaning of the law. Even if the views there ex-

pressed were erroneous it would not follow that the court's findings of fact must be set aside; and, so long as the findings of fact stand, the decree is unassailable.

It appears from the recital of the petition for appeal (see page 553) that, subsequent to the entering of this decree, there was a petition for rehearing, and an order overruling such petition. In denying the petition for rehearing the court below filed a supplemental opinion which has not been incorporated in the transcript on appeal. Rule 14 of this court requires the record to contain a copy of the opinion, or opinions, filed in the case below. If the court's findings of fact are to be examined, and either upheld or rejected upon a consideration of the legal views entertained by the court below rather than an examination of the evidence in the cause, it is certainly important that this rule should be complied with, in order that this court may see just how far the findings of fact may have been affected by legal theories. In the opinion filed below, upon the petition for rehearing, the court reviewed most of the criticisms now made by the appellants upon the opinion first filed, and pointed out quite clearly that it was not necessary to the findings or decree that all the views expressed in the opinion first filed should be sustained.

The real question in the case is whether there was a "known lode" within the limits of the ground in controversy, at the time of the application for the placer patent in December of 1878. The exterior boundaries of the "Morning Star" location included part of the ground in controversy, but not the whole of it. The discovery upon the "Morning Star" was outside of the lands in suit. The "Childe Harold" location was made subsequent to the issuing of the patent under which the appellee claims, and was based upon the supposed existence of a lode at the point of the original discovery of the "Morning Star." It was so located as to extend nearly 750 feet further into the lands covered by the placer patent than did the "Morning Star" location. We do not understand the appellants to now claim that they can hold under the "Childe Harold" location any territory not covered by the "Morning Star."

As to the ground covered by the "Morning Star" location, it is claimed by the appellants that the same is excepted from the placer patent, under which the appellee claims:

First, because the ground included within the exterior limits of the "Morning Star" location was not, at the time of the application for the placer patent, a part of the public domain, and hence not subject to grant on

the part of the Government except upon the application of the owners of the lode location;

Second, that, even if their first position be unsound, such ground was excepted from the placer patent by virtue of the fact that it constituted a "known lode" within the meaning of the law at the time the application was filed for patent.

To sustain the first point, appellants assume that lands upon which a lode location has been made, whether valid or invalid and whether a lode exists or not, are, by virtue of the fact of such location, necessarily withdrawn from the public domain so as not to be subject to agricultural filing or placer location. This is a mistaken view. To give to a lode location such effect it is of course necessary that a vein should exist and should have been discovered. It may be true that, as between two claimants for the same ground under lode locations, since both concede and assert that the land contains a lode and is subject to purchase as a lode claim, such location would be considered as withdrawing the land for the time being from the public domain; but, as against one locating the land as placer land or filing upon it as agricultural land, something more would be necessary than merely to show that a lode claim had been staked out and located in order to

defeat such subsequent location. It would be necessary to show that in fact a lode existed, containing sufficient mineral to justify the lode location, otherwise the latter might be ignored.

This question is not, however, in the case. The appellants do not claim under the "Morning Star" location, and that location was abandoned at least long before the placer patent issued from the United States. It is not claimed by appellants that the land involved was not a part of the public domain at the time of issuance of the placer patent. At that time the government had full right to sell and dispose of the land. The patent regularly issued upon application and proofs regularly made and, as between the patentee and the Government, the title to the land in question passed. The patent, and the title which it purports to transfer, are not subject to be assailed collaterally. In order to prevail in this action it was necessary for the appellants to bring themselves within the exception of the patent itself, and to show that at the time the application for the placer patent a "known lode" existed within the lands covered by such patent.

On the second point, it is enough to say that the court below has distinctly found that there was no "known lode" within the limits of the ground in con-

troversy; indeed the court goes further and, as will appear from the opinion at page 529, holds that at the point of discovery of the "Morning Star" (where it is claimed that a well defined vein is disclosed), mineral of sufficient value was not disclosed to justify working even at this day with railway facilities and improved methods, having no existence in 1878.

The claim advanced that the court below was in error as to what constitutes a "known lode" within the meaning of Section 2333 of the Revised Statutes is not supported by the decisions.

See *Dower vs. Richards* 151 U. S. 658;

s. c. *Richards vs. Dower* 22 Pac. 304.

See also *Dower vs. Richards* 15 Pac. 105; 73 Cal. 477.

Sullivan vs. Iron Silver Min. Co. 143 U. S. 431.

Iron Silver Min. Co. vs. Mike & Starr G. & S. Min. Co. 143 U. S. 404.

Davis vs. Wiebold 139 U. S. 507; 11 Sup. Ct. Rep. 628.

Dahl vs. Raunheim 132 U. S. 260.

United States vs. Iron Silver Min. Co. 128 U. S. 673; 9 Sup. Ct. Rep. 199.

Deffeback vs. Hawke 115 U. S. 392.

Brownfield vs. Bier 39 Pac. 461.

What constitutes a "known lode" within the meaning of Section 2333?

“It is established by former decisions of this court that under the Acts of Congress which govern this case in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patent takes effect; *but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them*; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable for such purposes does not defeat or impair the title of persons claiming under the townsite patent.”

Dower vs. Richards 151 U. S. 663.

In Davis vs. Wiebold the Court quotes with approval the language of Judge Deady in United States vs. Reed as follow?:

“The land department appears to have adopted a rule that if the land is worth more for agricultural than mining it is not mineral land although it may contain some measure of gold and silver, and the bill in this case is drawn on that theory of the law. In my judgment this is the only practicable rule or decision that can be applied to the subject. *Nor can account be taken in the application of this rule, of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist or may be*

produced or expected in the ordinary course of such a pursuit or adventure on the land in question."

Page 522.

In the same case the Court quotes approvingly the language of Secretary Teller:

"The burden of proof, therefore, is upon the mineral claimant, and he must show not that neighboring or adjoining lands are mineral in character, *or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character; but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory that must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value; he must show affirmatively in order to establish his claim that the mineral value of the land is greater than its agricultural value."*

In the same opinion the Court quotes approvingly the language of the Court in the case of the Colorado Coal and Iron Company vs. the United States, as follows:

"To constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land *ascertained,*

discovered deposits of such an extent and value as to make the land more valuable to be worked as a discovered mine under the conditions existing at the time than for mere agricultural purposes. The circumstances that there are surface indications of the existence of veins of coal does not constitute a mine,—does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequent to the sale whereby known discoveries are made or any means whereof it may become profitable to work the veins and mines cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual known mines capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture the title to them acquired under the pre-emption act cannot be successfully assailed.”

Page 524

The Court also in *Davis vs. Wiebold* says:

“The grant or patent when issued would thus be held to carry with it a determination of the proper authorities *that the land patented is not subject to the exception stated.* There has been no direct adjudication on this point by this court, but this conclusion is a legitimate interference from several of its decisions.”

Iron Silver Mining Company vs. Mike and Starr Mining Company, 143 U. S. at page 404 the Court says:

"It is undoubtedly true that not every crevice in the rocks nor every outcropping on the surface which suggests the possibility of mineral or which may on subsequent exploration be found to develop ore of great value can be designated a vein or lode within the meaning of the statute."

The Court quotes approvingly from United States vs. Iron Silver Mining Company the following:

"It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold, or silver or other metal to justify the designation of known veins or lodes. *To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and to justify their exploration.*"

On page 405 in the same opinion the Court says:

"The amount of ore, the facility for reaching and working it as well as the product per ton, are all to be considered in determining whether the vein is one that justified exploitation and working."

In the opinion of Justice Field in the above case it is said on page 421.

"To embrace the lode within the patent of the placer claim the applicant must, if it be known,

pay for it at the rate of \$5 per acre. But he cannot pay any more or offer to pay more, he is informed until he has ascertained the number of acres contained in the lots. These decided, that to settle the ground can be measured, nor would the officers of the Land Department accept any sum from the applicant until such measurement upon the maps previously opened as to the extent of the lots.

So in the concluding opinion of Judge Field in *Frederick vs. First Silver Mining Company*, same volume at page 441, it is said:

'Before a vein or lode can be deemed to fall within this exception from the patent issued to a known lode existing at the time of the application of the patentee a lode must be discovered and located so far as to be capable of measurement.'

At page 445 same volume, Justice Field says:

'It is a matter well known to persons at all familiar with mining for the precious metals that veins rich in gold and silver are generally found with barren rock within a few feet on each side of them and that such veins were discovered and otherwise made known to the world. No one who is familiar would feel justified in concluding that from mere distance from other mines they had any necessary connection with each other.'

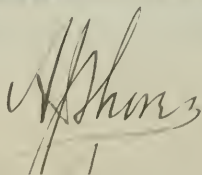
He then quotes approvingly the language of the court in *Dahl vs. Superior* above cited. In the case of

the United States vs. Iron Silver Mining Company, 128 U. S., which was an action to cancel patent, the court held that the issuance of the placer patent involved a determination upon the part of the land officers that the lands were placer lands and did not contain known veins or lodes and quotes approvingly from the language of the court in the Maxwell Land Grant case as follows:

“It thus appears that the title of the defendants rests upon the strongest presumption of fact, which, although it may be rebutted nevertheless *can be overthrown only by full proof to the contrary, clear, convincing and unambiguous.* The burden of producing these proofs and establishing the conclusion to which they are directed, rests upon the government.”

We fail to perceive any distinction between the case of the defendants and that of the government in assailing the patent. The defendants claim under the United States and must establish their title by proofs of the same character that would be essential in an action by the United States to cancel the patent or establish its title as against the patent to any portion of the lands covered thereby. However this may be, the evidence amply supports the findings and decree.

Respectfully submitted,



W. H. Jones

No. 284.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JAMES D. BYRNES, et al.

Appellants.

vs.

J. M. DOUGLASS, et al.

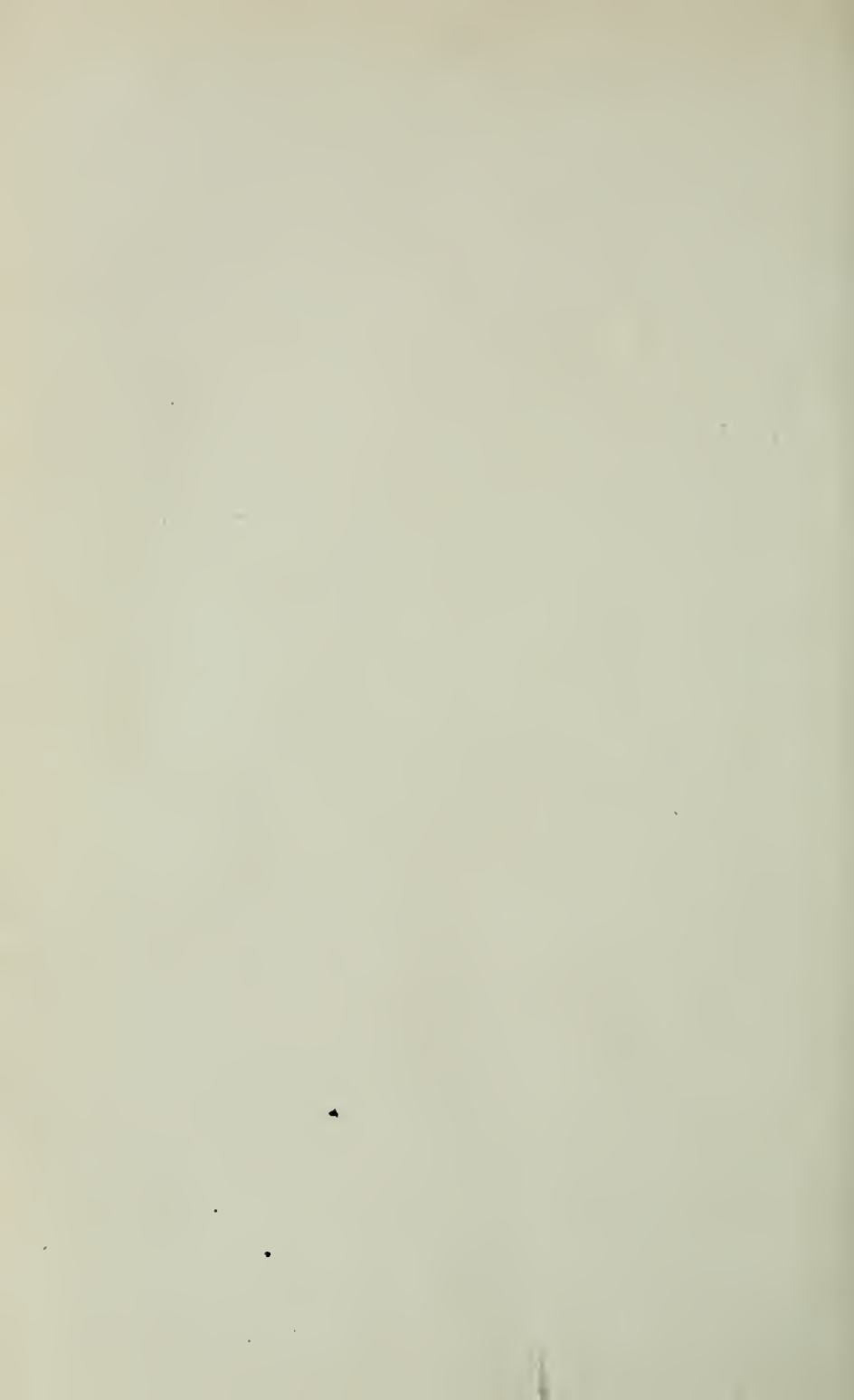
Appellees.

FILED

APR 3 - 1896

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States,
Ninth Circuit, District of Nevada.



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*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS and THE GOOD-
MAN MINING COMPANY,

Plaintiffs,

vs.

JAMES D. BYRNES, EDWARD MUL-
VILLE, H. C. BIGGS, MAGGIE LEE
McMILLAN, THE RED JACKET
CONSOLIDATED MINING COM-
PANY, a Corporation, and THE
SOUTH END MINING COMPANY,
a Corporation,

Defendants. }

Bill of Exceptions and Statement on Appeal.

Be it remembered, that J. M. Douglass, one of said plain-
tiffs, filed in said Circuit Court his Amended Complaint
and Petition, which is in the words and figures following,
to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS,

Plaintiff,

vs.

JAMES D. BYRNES, EDWARD MUL-
VILLE, H. C. BIGGS, MAGGIE LEE
McMILLAN, THE RED JACKET
CONSOLIDATED MINING COM-
PANY, a Corporation, and THE
SOUTH END MINING COMPANY,
a Corporation,

Defendants.

Amended Complaint and Petition.

Now comes the above-named plaintiff, J. M. Douglass, and by leave of the Court, on consent of defendants, first had herein, files this, his amended petition, and says, that he is a citizen of the United States and is engaged in the business of mining for gold and silver ores in the Devil's Gate and Chinatown Mining District, Lyon county, State of Nevada. That in said district is a mining claim known and called the Goodman mine. That said mine is owned by the Goodman Gold and Silver Mining Company, a corporation, organized and existing under the laws of the State of Nevada, with a capital stock of six millions of dollars, divided into sixty thousand shares of the par value of one hundred dollars each. That your petitioner at the time of the commencement of this proceeding was and now is the owner and holder of a controlling interest

of the capital stock of said corporation, to-wit, of forty-seven thousand eight hundred and sixty-five shares of said sixty thousand shares of said capital stock, and that he is and has been for two years last past, engaged in mining in said Goodman mine, for his own benefit, in his own individual interest, at his sole individual expense and outlay, and with knowledge, acquiescence and consent of said corporation, the owner of said mine. That there is also in said mining district a mining claim located, known and called the Contact G. & S. Mining Claim, in which your petitioner is one-half owner. That lying between said Contact G. & S. mining claim and said Goodman mine are the following mining locations, to-wit: The Atlantic Consolidated mining claim, the Annie mining claim, the South End mining claim, the Red Jacket mining claim, and the Clinton mining claim. That the only direct, convenient and economical way for working and developing said Goodman mine and said Contact G. & S. mining claim is by means of a mining tunnel run and constructed from said Contact mine into said Goodman mine through said five intervening mining locations.

Your petitioner would further show that in the judgment of your petitioner the said Goodman mine and mining claim will, when prospected and developed, become and prove to be a valuable claim, out of which large quantities of valuable gold and silver bearing ores, rock and earth may be extracted; that said Contact mine is of easy access for all purposes connected with mining operations, while the said Goodman mine is situated upon an elevation of land about four hundred feet above said Contact mine, and that said Goodman mine cannot be worked, prospected or developed by any tunnel shaft or excava-

tion run, dug or made therein, except at great expense, and such an expense as will render mining thereon or therein impracticable, and that the only sure, economical and feasible method by which said Goodman mine can be worked and developed is by and through said tunnel and in connection with the working of said Contact mine. That to construct said tunnel it was necessary to pass through said intervening mining claims or parts thereof. That your petitioner endeavored to work and develop said Goodman mine by means of vertical shaft sunk thereon but after the expenditure of a large sum of money in sinking said shaft he was compelled to abandon said shaft as impracticable by reason of encountering water therein that could not be handled through and by means of said shaft. That it was absolutely necessary to construct said tunnel into said Goodman mine to drain said water therefrom and reach the ledge therein so as to mine the same, without which said Goodman mine will be worthless. That when said tunnel shall be completed it will be a permanent public use and benefit to all of said mining claims in said district.

That your petitioner has at his own cost and expense and for the purpose of enabling him to carry on his said business of mining in and developing said Goodman mine, amounting to more than six thousand dollars, already constructed said tunnel from said Contact mine through said Atlantic Consolidated mining claim, said Annie mining claim, a part of said Red Jacket mining claim, a part of said South End mining claim and through said Clinton mining claim, into said Goodman mine, and is still driving said tunnel to reach the ledge of said Goodman mine and drain the water therefrom.

That he has been so engaged in running said tunnel for the purpose of developing said mines as aforesaid and the discovery of any blind or unknown ledge or ledges on the line of said tunnel since the 16th day of September, 1891, with the knowledge and without any objection from owners or claimants of said mining claims until he had passed through them as aforesaid.

That said tunnel from its mouth on said Contact mine to its present face in said Goodman mine is of the dimensions, to-wit, seven and one-half feet wide by seven and one-half feet high, the same being necessary and proper dimensions for same, and with which said tunnel passes through two hundred sixty-five and six-tenths (265 6-10) feet of said Atlantic Consolidated mining claim, and one hundred seventy-one and seven-tenths (171 7-10) feet of said Annie mine, ninety and eight-tenths (90 8-10) feet of said Red Jacket mine, fifty-six and three-tenths (56 3-10) feet of said South End mine, and one hundred and forty-five (145) feet of said Clinton mine, to the line of said Goodman mine. That your petitioner desires to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel so constructed from said Contact mine into said Goodman mine, particularly described as follows, to-wit: Beginning at a point on said Contact mine on the south side of American Ravine whence bears the southwest corner post of the Comet North Extension mining claim, which is U. S. survey No. 150, south three degrees and forty-three minutes west, distance two hundred and seventy-five feet and running first course south sixty-eight degrees and fifteen minutes west three hundred sixty and three-tenths feet; thence second course

south forty-six degrees and fifteen minutes west sixty-one and one-tenth feet; thence third course south sixty-three degrees and eighteen minutes west thirty-four and two-tenths feet; thence fourth course south fifty-three degrees and forty-five minutes west eighty-eight feet; thence fifth course fifty-four degrees and eleven minutes west thirty-three and six-tenths feet; thence sixth course south seventy-nine degrees and forty-seven minutes west forty-one and three-tenths feet; thence seventh course south forty-three degrees and six minutes west forty-nine and nine-tenths feet; thence eighth course south sixty-one degrees and fifty-one minutes west seventeen and five-tenths feet; thence ninth course south seventy-six degrees and eight minutes west thirty-three feet; thence tenth course south sixty-eight degrees and thirty-three minutes west three hundred and forty-seven feet to the line of the said Goodman mine magnetic variation sixteen degrees, thirty minutes east. That he desires to appropriate on said course, seven and one-half feet wide by seven and one-half feet high, two hundred sixty-five and six-tenths feet of said Atlantic Consolidated mining claim, one hundred and seventy-one and seven-tenths feet of said Annie mining claim, ninety and eight-tenths feet of said Red Jacket mining claim, fifty-six and three-tenths feet of said South End mining claim, and one hundred and forty-five feet of said Clinton mining claim to the said Goodman mine.

That there exists a necessity for the said number of feet with the said height and width through said mining claims being appropriated to your petitioner, to enable him to carry on his said mining business in working and developing said Goodman mine, as by no other means can be conveniently and economically reached the mineral bearing

ledge in said Goodman mine and drain said mine of the water therein and that said tunnel when completed will be of great use and benefit in working expeditiously, conveniently and economically all the mining claims on the line thereof as aforesaid.

That so far as your petitioner can ascertain the said defendants James D. Byrnes and Edward Mulville claim to be the owners of, or to have some interest in said Atlantic Consolidated mine. That said defendants, H. C. Biggs and Maggie Lee McMillan claim to be the owners of, or to have some interest in said Annie and Clinton mines; that said defendant, Red Jacket Consolidated Mining Company claims to be the owner of said Red Jacket mine, and said defendant, South End Mining Company claims to be the owner of said South End mine, and these are all the parties, so far as your petitioner can learn or ascertain, who claim any interest in said five mining locations, or any of them, but what interest or if any said parties or any thereof have, or has in any of said claims, your petitioner does not know and does not admit any. Your petitioner further shows that he is now in possession of said tunnel through all of said mining claims by an order of a judge of the District Court of the State of Nevada, Lyon county, and he is desirous of remaining in the possession thereof as by said order provided and upon the security given to secure the compensation for said parts of said mining claims when such compensation shall have been ascertained.

Your petitioner further shows that he located a tunnel right as above described as by the laws of congress provided. Your petitioner further shows that from the mouth of said tunnel on said Contact mine to the line of said Atlantic Consolidated mine the distance is two hun-

dred and ninety-nine feet, from which on said course of said tunnel to said Goodman mine the aforesaid five mining claims lie successively touching, making the number hereby sought to be condemned and appropriated between the said Contact and Goodman mines eight hundred eleven and seven-tenths feet, seven and one-half feet high by seven and one-half feet wide apportioned among five said mining claims as aforesaid. That no damage can possibly result to any of said mines by the construction of said tunnel through them or any of them but as your petitioner verily believes said tunnel will be a benefit to all of said mines. That said tunnel was by your petitioner located Feb'y 6th, 1893, and recorded by the name Contact-Goodman tunnel.

Wherefore, petitioner prays that this court or the judge thereof appoint three competent and disinterested persons as commissioners under the act of the legislature of the State of Nevada entitled, "An Act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada," approved March 1st, 1875. That the parts of said mining claims, hereinbefore set out, be appropriated to the use and benefit of your petitioner, and that said commissioners be directed to convey the same to your petitioner; that the defendants herein and all other persons known or unknown, who claim any interest in said claims be required to assert the same, and for all general relief.

F. M. HUFFAKER, and

BAKER, WINES & DORSEY,

Attorneys for Petitioner.

State of Nevada, }
County of Storey. } ss.

J. M. Douglass, being first duly sworn says he is the petitioner named in the foregoing proceedings, that he has heard read the foregoing amended petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. M. DOUGLASS.

Subscribed and sworn to before me this 8th day of September, 1893.

[Seal]

F. M. HUFFAKER,
Notary Public, Storey County, Nevada.

[A Copy.]

I hereby certify the foregoing to be a full, true and correct copy of the original hereof.

Witness my hand this 8th day of Sept. 1893,

F. M. HUFFAKER,
Attorney for Petitioner.

Afterwards the defendants in said action and proceeding filed their Answer to said amended petition, which is in the words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

J. M. DOUGLASS,

Plaintiff.

vs.

JAMES D. BYRNES, EDWARD MULVILLE, H. C. BIGGS, ANDREW CHARLES, GEO. W. DEBUS, MAGGIE LEE McMILLAN, THE RED JACKET GOLD AND SILVER MINING COMPANY, a Corporation, and THE SOUTH END MINING COMPANY, a Corporation.

Defendants.

Answer.

And now come James D. Byrnes, Edward Mulville, H. C. Biggs, Geo. W. Debus, Maggie Lee McMillan, The Red Jacket Gold and Silver Mining Company, a corporation, and The South End Mining Company, a corporation, defendants named in the above-entitled action and for their joint and several answer to the complaint of plaintiff on file in the above-entitled action, and for answer to order to show cause issued therein, admit that J. M. Douglass, the plaintiff named in the said action, is a citizen of the United States. They allege that they are informed and believe that said plaintiff is not the owner of said Goodman mine. They are informed and believe that said plaintiff is not the owner of the Contact mine mentioned in said complaint,

except as trustee for James D. Byrnes and Edward Mulville, and upon such information and belief they deny that said plaintiff is the owner of said Contact mine, except as such trustee. They admit that said plaintiff is an owner, as tenant in common with Maggie Lee McMillan and H. C. Biggs, of the Contact G. & S. mining claim. They admit that the Atlantic Consolidated mining claim, the Annie mining claim, the South End mining claim, the Red Jacket mining claim, and the Clinton mining claim, mentioned in said complaint, are between said Contact G. & S. mining claim and said Goodman claim, and they allege that said Contact G. & S. mining claim lies in front of and lower down the hill and below each and all of said mining claims above and in said complaint mentioned. They admit that the most convenient and economical way of working and developing the Goodman and Contact claim is by means of a tunnel from said Contact mine into said Goodman mine. Defendants deny that when the tunnel mentioned in said complaint shall have been completed it will be a public use or benefit to all or any of the mining locations in the district where said claims are situated except said Goodman mine; but on the contrary, the defendants allege that said tunnel will be solely for the private use and benefit of said plaintiff if run by plaintiff and said Goodman mine and the owners thereof.

Defendants deny that said plaintiff has at his own cost or expense already constructed said tunnel from said Contact mine through said Atlantic Consolidated mining claim, Annie mining claim, a part of Red Jacket mining claim, and South End mining claim and into said Clinton mining claim and near the line of said Goodman mine; but on the contrary defendants allege that

when said plaintiff took possession of said tunnel, as hereinafter mentioned, said tunnel had already been constructed by said Atlantic Consolidated Mining Company a distance of about four hundred feet from the mouth thereof through said Contact mining claim and into the Atlantic Consolidated mine, and that said plaintiff simply repaired the portion then run and continued said tunnel to a point near the line of said Goodman mine through the mines west of said Atlantic Consolidated mine. Defendants deny that since the 16th day of September, 1891, said plaintiff has been engaged in running said tunnel without any objections from the owners of said mining claims; but on the contrary said tunnel was run against the objections of defendants since the 4th day of January, 1893. Defendants deny that there exists the necessity of the number of feet with the height and width through said mining claims mentioned in said complaint upon the line and course described in said complaint being appropriated to said plaintiff to enable him to develop said Goodman mine, or to successfully carry on his business of mining in said district; but on the contrary defendants allege that said plaintiff can run a tunnel of his own at any other point from said Contact mine to said Goodman mine upon some other course than that described in said complaint, in and upon land not occupied by the tunnel described in said complaint. Defendants deny that said tunnel, when completed by plaintiff, will be of equal use or benefit to all or any of these defendants in developing expeditiously, conveniently or economically each or any of said five intervening mining claims; but on the contrary, said tunnel is and has been since the fourth day of January, 1893, run by

plaintiff for himself and claimed by him as his own property for his own use and benefit. Defendants deny that defendants, H. C. Biggs, Andrew Charles and Maggie Lee McMillan, or either of them, have by force or by arms, except as hereinafter stated, taken possession of said tunnel, or have balkheaded the same, or refused to permit plaintiff to proceed with the construction of said tunnel and they deny that said defendants or any of them have since the 5th day of June, 1903, excluded plaintiff from the possession of said tunnel or refused to permit plaintiff to proceed with the construction of said tunnel, but on the contrary defendants allege that said plaintiff is in the possession of said tunnel under an order of court issued in this action. Defendants deny that their permitting plaintiff to construct said tunnel would not interfere in any wise with said defendants' possession or working said Annie mine, or would not deprive them of any property; but on the contrary defendants allege plaintiff did prevent said owners of said Annie mine and the owners of all other of said mines from working or entering their mines through said tunnel, until said defendants, H. C. Biggs and Maggie Lee McMillan, took possession of the same as hereinafter described.

Defendants admit that defendants, James D. Byrnes and Edward Mulville, are the owners of the Atlantic Consolidated mine; that said defendants, H. C. Biggs and Maggie Lee McMillan, are the owners of the Annie and Clousa mines, but they deny that Andrew Charles and George H. Debus are, or either of them is, the owner of either of said mines, or of any property or land upon the course of said tunnel described in the complaint in this action. They admit that The Red Jacket Consolidated

Mining Company, a corporation organized and existing under the laws of the State of California, is the owner of the Red Jacket mine, and defendant, South End Mining Company, is the owner of said South End mine, and they admit that these defendants are all the parties having any interest in said five mining locations. Defendants deny that said plaintiff is not in the possession of said tunnel, but they admit that he was not in the possession of said tunnel when this action was commenced. Defendants deny that plaintiff located any tunnel right as described in said complaint as by law of congress required, or except as hereinafter stated.

Defendants deny that no injury can possibly result to any of said mines by the construction of said tunnel, or that said tunnel was by said plaintiff located on February 6th, 1873, except as hereinafter stated.

And for a further answer and defense to this action, and to show cause why the prayer of said petitioner's complaint should not be granted and why three commissioners should not be appointed as prayed for by plaintiff, and why said five claims or any of them should not be appropriated to the use or benefit of said J. M. Douglass as a right of way for said tunnel or for any other purpose, these defendants allege and show to the Court that said defendants, James D. Byrnes and Edward Mulville, are now and ever since the 19th day of March, 1892, have been the owners in fee simple and entitled to the possession of those certain premises and mining claim known as and called the Atlantic Consolidated Mining Company's claim and premises, situate, lying and being in the Devil's Gate and Chinatown Mining District, Lyon county, State of

Nevada, described as follows, to-wit: That certain mining claim or premises being mineral entry No. 152, in the series of the office of the register of the land office at Carson City, in the State of Nevada, designated by the surveyor general as lot No. 111 embracing the portion of section eight (8) in township sixteen (16) north, of range twenty-one (21) east, Mount Diablo meridian, in the Devil's Gate and Chinatown Mining District in the counties of Lyon and Storey and State of Nevada, in the district of lands subject to sale at Carson City, containing eight (8) acres and twenty-six hundredths (26/100) of an acre of land, more or less, according to the returns on file in the general land office, bounded, described and platted as follows, with magnetic variations of sixteen (16) degrees, thirty (30) minutes east, to-wit: Beginning at a post marked No. 1, U. S. survey No. 111, from which the southwest corner of section eight (8) in township sixteen (16) north, range twenty-one (21) east, Mount Diablo meridian, bears south forty-one (41) degrees fifteen (15) minutes west, at the distance of thirty-one hundred and seventy-two (3172) feet; thence from said post south eighty-two (82) degrees east two hundred (200) feet to a post marked No. 2, U. S. survey No. 111; thence south eight (8) degrees west eighteen hundred (1800) feet to a post marked No. 3, U. S. S. No. 111; thence north eighty-two (82) degrees west two hundred (200) feet to post marked No. 4 U. S. survey No. 111; thence north eight (8) degrees east eighteen hundred (1800) feet to the place of beginning, containing eight (8) acres and twenty-six hundredths (26/100) of an acre of land more or less, embracing eighteen hundred (1800) linear feet of said Pacific lode, to-wit: Six hundred (600) linear feet north-

erly and twelve hundred (1200) linear feet southerly from discovery stake on said lode, as represented by yellow shading in the plat on page 141, Book "B" records of survey, in office of the county recorder of Lyon county, Nevada; together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the rents, issues and profits thereof. That said defendants, James D. Byrnes and Edward Mulville are now and ever since the 1st day of January, 1890, have been by themselves and their predecessors in interest and grantors and their tenants, so the owners seized in fee of the said mining claims and premises, together with the appurtenances and until the wrongful acts of the plaintiff hereinafter mentioned, were in the peaceable, quiet and lawful possession of the said premises and mining claim and the whole thereof, together with the appurtenances.

That prior to the 22d day of March, 1890, the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville, constructed a mining tunnel known as and called the Atlantic Consolidated tunnel, commencing upon public mineral land of the United States, adjoining and contiguous to said Atlantic Consolidated mining claim above described, which public mineral land of the United States was then and there in the lawful, peaceable and quiet possession of the predecessors in interest and grantors of said defendants, James D. Byrnes and Edward Mulville, and continued the con-

struction thereof through the said public mineral land of the United States, and into and upon the premises hereinbefore described, the said Atlantic Consolidated mining claim, for the purpose of prospecting, exploring and working said mining claim and premises. That defendants' predecessors in interest and grantors did by means of said tunnel prospect said mining claim and premises, and that said tunnel with the right of way through said adjoining mineral land of the United States and the right to work, prospect and develop said Atlantic Consolidated mining claim by means of said tunnel, are appurtenant to and belong and are a part of the said Atlantic Consolidated mining claim and premises hereinbefore described. That the tunnel described in the complaint in this action is the same tunnel described in this answer, and that said tunnel was actually constructed by the Atlantic Consolidated Mining Company, and the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville, a distance of about four hundred feet from its mouth, long before said plaintiff entered into the possession thereof under a lease as hereinafter set forth and described. That said tunnel was run and constructed by the Atlantic Consolidated Company, the predecessor in interest and grantor of defendants, James D. Byrnes and Edward Mulville, as hereinafter described, and said company last mentioned on the 22d day of March, 1890, leased and demised said tunnel by a lease, a copy of which is hereto annexed and made part of this answer, to one W. H. Stanley, and said W. H. Stanley afterwards, and on or about the 22d day of March, 1890, entered into possession of said described premises including said tunnel, under said lease, and remained in the possession thereof until

the 16th day of September, 1891, when one Frank A. Muhlbe-
yey, in his own name but for the sole use and benefit of
the plaintiff in this action, bought said lease from said
W. H. Stanley, and said Frank A. Muhlbe-
yey afterwards and on the date last aforesaid sold, transferred and as-
signed said lease to Joseph M. Douglass, the plaintiff in
this action, who entered into the possession of said At-
lantic Consolidated mining claim and said tunnel under
said lease, and who under said lease worked said mine
and took out ore therefrom and had it crushed. That said
J. M. Douglass claims title to the said Contact mine so
called, mentioned in said complaint under and by virtue
of a conveyance made to him by said Frank A. Muhlbe-
yey. That said W. H. Stanley was in possession of said Atlantic
Consolidated mine and said tunnel under said lease as
said plaintiff, Joseph M. Douglass well knew, and while he
was a tenant of said Atlantic Consolidated Mining Com-
pany, as said plaintiff well knew, said W. H. Stanley, in
order to secure and peaceably hold said mine and work
the same through said tunnel under said lease, purchased
said Contact mine from one C. E. Brown by a good and
sufficient conveyance made and delivered by said Brown
to said W. H. Stanley on the 13th day of June, 1891, and at
the time when he assigned said lease he (said Stanley)
conveyed said Contact mine on the 16th day of September,
1893, to said Frank A. Muhlbe-
yey, all of which said plain-
tiff well knew. That afterwards, and on the 16th day of
September, 1891, said Frank A. Muhlbe-
yey assigned,
transferred and set over to said plaintiff said lease, and at
the same time conveyed to said plaintiff the interest in the
said Contact claim which said Stanley had conveyed to
him as aforesaid, and said plaintiff took possession of

said Atlantic Consolidated mine and said tunnel and said Contact mine under said lease and held possession thereof and worked said Atlantic Consolidated mine as tenant of said Atlantic Consolidated mine, and that by virtue thereof and by reason of said purchase of said Contact mine said Joseph M. Douglass holds the title to said Contact mine in trust for defendants, James D. Byrnes and Edward Mulville. That at the time when said plaintiff received said lease said South End Mining Company was the owner and in the possession of the South End mining claim described in said complaint, and ever since has been the owner and in the possession thereof, and said Red Jacket Consolidated Mining Company was then and ever since has been the owner of said Red Jacket mining claim described in said complaint. That at the time when said plaintiff received said lease, the Annie claim and Clinton claim were vacant and unoccupied mineral land of the United States, and afterwards and prior to the commencement of this action the predecessors in interest and grantors of said defendants, H. C. Biggs, Maggie Lee McMillan, being then and there citizens of the United States, having discovered within the boundaries of each of said Annie and Clinton claims a ledge of gold and silver-bearing quartz rock in place, located each of said claims last mentioned, in accordance with the laws of the United States and of the State of Nevada, and in accordance with the local rules, laws and customs of the miners of the district where said claims are situated, and said locators afterwards and prior to the commencement of this action by good and sufficient conveyances conveyed said claims to said H. C. Biggs and Maggie Lee McMillan, and said H. C. Biggs and Annie Lee McMillan have ever

since owned the said claims and have ever since complied with all of said laws, rules and customs and are entitled to hold, possess and work the same through and by means of said tunnel described in said complaint and in this answer. That on the 6th day of February, 1893, said plaintiff made a pretended location of the tunnel right described in said complaint, a copy of the notice of location of which is hereunto annexed marked "Exhibit B." That at the time said location was made all the land described within the boundary lines of the said tunnel right had been before that time located, held, owned and possessed by the plaintiff and by the defendants in this action and by the Goodman Mining Company, and by their grantors and predecessors in the mining claims under the act of congress and by the Goodman Mining Company. That the Goodman mine was then and long prior thereto, and ever since has been owned and possessed by the Goodman Mining Company, a corporation organized and existing under and by virtue of the laws of the State of California. The Red Jacket mining claim was owned and possessed by The Red Jacket Consolidated Mining Company, a California corporation; the South End mining claim was owned and possessed by The South End Mining Company, defendant; the Annie and Clinton mining claims by the predecessors in interest and grantors of H. C. Biggs and Maggie Lee McMillan, and the Contact mining claim by the plaintiff as trustee in equity for the defendants, James D. Byrnes and James J. Greene, and by the predecessors in interest and grantors of H. C. Biggs and Maggie Lee McMillan. That said James J. Greene conveyed his interest in said Atlantic Consolidated mining claim and said tunnel to Edward Mulville, defendant, February

25th, 1893. That no ledge or vein, or other deposits of ore within the boundary lines of said tunnel claim was vacant or unoccupied at the time of plaintiff's location, and no land within the boundaries of said tunnel claim was vacant or unoccupied at said time, and no ledge, vein or lode was penetrated or discovered by running said tunnel that was not either known to exist at the time of said location, or that was not owned and possessed by the defendants in this action or by some of them, or by their predecessors in interest and grantors, and that the location by plaintiff of said tunnel right was absolutely null and void, and that plaintiff has not by means of said tunnel discovered or found any lode, vein or ledge that was not owned and possessed at the time by the defendants or some of them or by their predecessors in interest or grantors prior to said location.

Defendants allege that all the veins, lodes or ledges within the boundary lines of said tunnel right location are within the boundary lines of the claims mentioned in said complaint and in this answer, and all of them except said Goodman claim and except said Contact claim were owned and possessed by defendants or their grantors long before the location of plaintiff's tunnel right, and that plaintiff is seeking to condemn in these proceedings a tunnel already constructed through and upon mining claims owned by defendants and not for the purpose of discovering or locating any lode, vein or ledge.

That heretofore, to-wit, on or about the 4th day of January, 1893, and while the defendants, James D. Byrnes and Edward Mulville, were so the owners and so seized in fee simple of said Atlantic Consolidated mining claim and premises and said tunnel and right of way, and while

the predecessors in interest and grantors of said defendants, James D. Byrnes and Edward Mulville, were in the quiet and peaceable possession of said mining claim and premises and said tunnel and right of way, the said plaintiff by himself and his agents and employees entered into and upon said tunnel and into and upon the mining claim and premises hereinbefore described beneath the surface of the same and where the same is penetrated by said tunnel and ousted and ejected said defendants, James D. Byrnes and James J. Greene therefrom, and from thence hitherto until May 20th, 1893, said plaintiff wrongfully and unlawfully withheld the possession thereof from defendants, Byrnes and Mulville, and their predecessors in interest and grantors. That said defendants, Biggs and McMillan, on or about the 20th day of May, 1893, took possession of said tunnel by the permission of the owners thereof, for the purpose of carrying on the business of mining through said tunnel and for the purpose of prospecting and working said Annie and Clinton mines, and said defendants, Biggs and McMillan, at the time of taking possession of said tunnel were the owners of an undivided interest of one-half of said Contact mining claim, and entered upon their own property for the purpose of working their said claims through said tunnel and through the said Atlantic Consolidated claim by permission of the owners thereof.

Wherefore, the defendants having fully answered and shown cause therefor, pray that this action be dismissed with judgment for costs against plaintiff.

W. E. F. DEAL,
Attorney for Defendants.

Exhibit "A" to Answer.

This indenture, made the twenty-second day of March, in the year of our Lord one thousand eight hundred and ninety, between the Atlantic Consolidated Mining Company, a corporation organized and existing under the laws of the State of California, the party of the first part, and W. H. Stanley, of Virginia City, Storey county, State of Nevada, the party of the second part witnesseth: That the said party of the first part does by these presents release and demise unto the said party of the second part its mining property known as the Atlantic Consolidated mine, situated in the American Ravine one mile west of Silver City, in the Devil's Gate and Chinatown Mining District, counties of Lyon and Storey, State of Nevada, with the appurtenances for the term of two years from the 22d day of March, 1890, with the privilege of an extension of said lease for a further period of two years, at the rental of fifty cents per ton for each and every ton of ore extracted and milled from the said property, during the time of said lease, or the further extension of the same. It is hereby agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom, and the said party of the second part does hereby covenant, promise and agree to pay the said party of the first part the said rent in the manner hereinbefore specified and not to let or underlet the whole or any part of said premises without the written consent of the party of the first part, and that at the expiration of said term or the extension as aforesaid, the said party of the second

part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit. It is further agreed by the parties hereto that at any time during this lease or the extension as aforesaid, the said party of the second part shall have the right and privilege of purchasing from the said party of the first part seventy-five thousand shares of its capital stock, for the sum of twenty-five thousand dollars, which the said party of the first part hereby agrees to deliver to the said party of the second part upon the payment of the said sum as aforesaid.

In Witness Whereof, the said parties to these presents have hereunto set their hands and seals, in duplicate, the day and year first above written, the party of the first part being authorized thereto by a resolution of its board of directors passed at a meeting held March 22d, 1890.

THE ATLANTIC CONSOLIDATED M'G CO.

By James G. Greene, President, [Seal]

By D. M. Kent, Secretary, [Seal]

W. H. Stanley, [Seal]

State of California, }
 City and County of San Francisco. } ss.

On this twenty-second day of March, in the year one thousand eight hundred and ninety, before me, Charles D. Wheat, a notary public in and for said city and county of San Francisco, residing therein, duly commissioned and sworn, personally appeared James J. Greene, known to me to be the president, and D. M. Kent, known to me to be the secretary of the corporation described in, and that executed the within annexed instrument and they sev-

Chinatown Mining District, Lyon county, State of Nevada, said being seven and a half feet wide by seven and a half feet high and particularly described as follows, to-wit: Called the Contact-Goodman tunnel. Beginning at a point on the Contact mining claim on the south side of American Ravine, whence bears the S. W. corner post of the Comet north extension mining claim, which is United States mineral survey No. 150, S. 3 deg. 43 min. W. distance of 270 feet and running first course S. 68 deg. 15 min. W. 360.3 feet, then second course S. 46 deg. 15 min. W. 61.1 feet, thence third course S. 63 deg. 18 min. W. 34.2 feet, thence fourth course S. 53 deg. 45 min. W. 88 feet, thence fifth course S. 74 deg. 11 min. W. 33.6 feet, thence sixth course S. 79 deg. 47 min. W. 41.3 feet, thence seventh course S. 43 deg. 06 min. W. 49.9 feet, thence eighth course S. 61 deg. 51 min. W. 17.5 feet, thence ninth course S. 76 deg. 68 min. W. 33 feet, thence tenth course 68 deg. 33 min. W. 347 feet to the Goodman mining claim, patented, (magnetic variation 16 deg. 30 min. E.) the objective point of said tunnel; that the undersigned is an owner in said Contact mining claim, where said tunnel commences, and of the Goodman mining claim, for the development of which said tunnel is being run and all rights provided by said act of congress are hereby claimed. This tunnel is being run for the said purpose of developing the said Goodman mining claim as well as the Contact ledge and not to interfere with the rights of any others.

J. M. DOUGLASS,
Owner and Locator.

State of Nevada, }
County of Storey. } ss.

J. M. Douglass, being duly sworn says he is the owner and claimant of the above-described tunnel, that said tunnel has been run by his predecessors and himself a distance of 718.1 feet from its face at a cost of \$3655, and more which were expended thereon and that it is his bona fide intention to prosecute work on the tunnel so located and above described with reasonable diligence for the development of the ledge in the Goodman mine and for the discovery of mines along its said described line and marked from this notice posted on a stake at the face of the above-described tunnel.

J. M. DOUGLASS.

Subscribed and sworn to before me this 6th day of February, 1893.

[Notarial Seal]

F. M. HUFFAKER,

Notary Public, Storey County, Nevada.

Recorded at the request of W. J. Douglass, Feb'y 6, 1893, at 25 minutes past two o'clock P. M. Thos. P. Mack, County Recorder.

State of Nevada, }
County of Lyon. } ss.

I, Thos. P. Mack, County Recorder of Lyon county in the State of Nevada, duly elected, qualified and acting and being by virtue of said office the legal custodian of the records of said Lyon county, do hereby certify that the annexed and foregoing is a full, true and correct copy of that certain location of tunnel right claimed by J. M.

Douglass, Feb'y 6th, 1893, as appears of record in book "A" page 22 of mining locations and ass't work, records of said Lyon county, State of Nevada.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at my office in Dayton, in county and State aforesaid, this second day of May, A. D. one thousand eight hundred and ninety-three.

THOS. P. MACK,

County Recorder of Lyon County, State of Nevada.

[Endorsed]: Certified copy of Location Notice of Contact-Goodman Tunnel.

[Endorsed]: In the Circuit Court of the United States, Ninth Circuit, District of Nevada. J. M. Douglass, Plaintiff, v. James D. Byrnes, et al, Defendants. Answer. Filed July —, 1893. W. E. F. Deal, Attorney for Defendants.

To which answer, plaintiffs filed the following replication, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS,	}
Plaintiff,	
vs.	
JAMES D. BYRNES, EDWARD MUL-	}
VILLE, H. C. BIGGS, MAGGIE LEE	
McMILLAN, THE RED JACKET	
CONSOLIDATED MINING COM-	
PANY, a Corporation, and THE	
SOUTH END MINING COMPANY,	
a Corporation,	
Defendants.	

Replication.

This repliant, J. M. Douglass, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants for replication thereunto, saith that he doth and will aver, maintain and prove his said amended petition to be true, certain and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true, all which matters and things this repliant is ready

to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by his said amended petition he hath already prayed.

F. M. HUFFAKER, and
BAKER, WINES & DORSEY,
Attorneys for Petitioner.

[Endorsed]: In the Circuit Court of the United States, Ninth Circuit, District of Nevada. J. M. Douglass, Plaintiff, v. James D. Byrnes, et al., Defendants. Replication. Filed this — day of — 1895. — Clerk.

Order Overruling Objections, Appointing Commissioners, etc.

After hearing had in said circuit court, the Court overruled the objections set forth in said answer, to which defendants then and there duly excepted. The Court thereupon appointed Joseph R. Ryan, H. M. Gorham and H. M. Clemmons, as commissioners, to ascertain and assess the compensation to be paid to the defendants having or holding any right, title or interest in or to the tracts of land or mining claims described in the pleadings, for and in consideration of the appropriation of such land to the use of said petitioners. Joseph R. Ryan was selected by plaintiff and petitioner; H. M. Clemmons was selected by the defendant, Red Jacket Consolidated Mining Company, a corporation. Afterwards, and before the taking of testimony, the Goodman Mining Company, mentioned in the amended complaint, was by the order of the Court made a party plaintiff, and thereafter the suit proceeded in the names of J. M. Douglass and the Goodman Mining Com-

pany, plaintiffs, against the defendants above named. Before the hearing was concluded, the South End Mining Company settled with the plaintiffs, and the matter proceeded as if the compensation, if any, to be paid to the South End Mining Company, had been paid by petitioners. The said commissioners met at a time and place ordered by the Court, and before entering on their duties were duly sworn as required by the statute of the State of Nevada, entitled "An Act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada," approved March 1st, 1875. The commissioners then viewed the several tracts of land mentioned in the petition and amended complaint. Afterwards the said commissioners appointed by the Court filed their report and findings, which is in words and figures, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}
Petitioners,	
vs.	
JAMES D. BYRNES, ET AL.,	
Defendants.	}

Report of Commissioners.

To the Honorable, the above-named court:

The commissioners appointed by said court to ascertain and assess the compensation to be paid for a right of way for the tunnel mentioned in the above-entitled proceedings report as follows: We met as ordered by said court in Virginia City, on August 21, 1894, and duly qual-

ified, and thereafter viewed the premises in controversy, and heard the allegations and proofs of the parties and arguments of counsel, regularly adjourning from time to time, and having duly considered the same now find the facts as follows, to-wit:

First: We find that petitioner J. M. Douglass is the owner of an undivided one-half interest in and to the Contact mine, and the tunnel therein, and that defendants, H. C. Biggs and Maggie Lee McMillan, are the owners each of an undivided one-fourth interest in same. That James D. Byrnes and Edward Mulville are the owners of the Atlantic Consolidated mine. That H. C. Biggs and Maggie Lee McMillan are the owners of the Annie, and of the Clinton mine. That the Red Jacket Mining Company is the owner of the Red Jacket mine, the right of way through the South End being conceded by the owners.

Second: We find that petitioners, J. M. Douglass and the Goodman Gold and Silver Mining Company, are entitled to the right of way seven and a half feet wide by seven and a half high as now run for the tunnel in controversy from its mouth on the Contact mine through 299 feet thereof; through the Atlantic Consolidated mine 265 feet thereof; through the Annie mine 173.3 feet; through the Red Jacket Consolidated mine 91 feet thereof, and through the Clinton mine 227.9 feet thereof, and to the exclusive use of the same, and if the owners of any of said claims desire to use said tunnel, they must either negotiate with said petitioners or proceed to condemn the same.

Third: We find that while there may have been some spots of good ore in the Annie and Clinton mines taken out in extending the tunnel in controversy, it was not in

sufficient quantities to be of any practical value, and as there is nothing to show that this ore was vitally thrown away, we find that no damage has accrued by reason of it, and we assess none.

Fourth. We find that The Red Jacket Consolidated Mining Company is entitled to the ore at the mouth of said tunnel, estimated at iron ten to fifteen tons, and that this represents the amount of ore taken from that mine in extending said tunnel.

Fifth. We find that said right of way through the Contract, Anne, Red Jacket, South End and Clinton mines, or either of them, is of no damage to said mines, and of no value, and no compensation should be paid by petitioners for said right of way through any one of them.

Sixth. We find that the right of way through the Atlantic Consolidated mine is of the value of one thousand twenty-one dollars and ninety-five cents, and we accordingly assess the damages to said mine at said sum, to be paid to defendants, James D. Byrnes and Edward Anville, the owners.

Respectfully submitted,

JOS. R. RYAN,

H. M. GEORGEHAM,

H. M. CLEMMONS,

Commissioners.

Virginia City, Nevada, September 1, 1894

Filed Sept. 4, 1894.

The defendants, except The South End Mining Company, within twenty days after the time of filing said report, and after ten days notice to petitioners and plain-

tiffs, moved said circuit court to set aside said report and grant them a new trial as to the tracts of land or claims owned by the defendants respectively. The objections filed by said defendants, with their notice and motion, are in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}
vs.	
JAMES D. BYRNES, ET AL.,	
Defendants.	

Motion for New Trial and Objections.

And now come the defendants in the above-entitled action, and for their objections to the report of the commissioners filed in this case, show to the Court:

I.

The first finding in the report is incorrect, against law and not supported by the evidence, in the following particulars:

A. The evidence shows that J. M. Douglass is not the owner of an undivided one-half interest in or to the Contact mine, or to the tunnel therein, but, on the contrary, the evidence shows that he holds the legal title to said Contact mine, and to the tunnel therein, as trustee for the defendants, James D. Byrnes and Edward Mulville; that, at the time he acquired the legal title to said Contact mine, he, at the same time, and as part

of the same transaction, and for the same consideration, acquired, by an agreement in writing, the lease of the Atlantic Consolidated mining claim from the Atlantic Consolidated Mining Company, the grantors and predecessors in interest of the defendants, Byrnes and Mulville; that said lease was made by said Atlantic Consolidated Mining Company to W. H. Stanley, from whom said J. M. Douglass acquired the legal title to said Contact mine and said lease, by his agent, Muhlbeier; that said W. H. Stanley entered into possession of said Atlantic Consolidated mine, and of the said tunnel, which was and is a part of said mine and appurtenant thereto, under said lease, and while he was in possession thereof, he acquired the legal title to said Contact mine, for the use and benefit of said Atlantic Consolidated Mining Company, and held the same in trust for said company, and that when said W. H. Stanley assigned said lease to Muhlbeier, the agent of J. M. Douglass, and conveyed said Contact mining claim to said Muhlbeier, the latter was acting as and was the agent of J. M. Douglass for said purposes, and as such agent, with possession of said Contact mining claim and said tunnel and said Atlantic Consolidated mine as the tenant of said Atlantic Consolidated Mining Company; that, at the time when said deed and said agreement of lease were made to said Muhlbeier by said W. H. Stanley said J. M. Douglass had full knowledge of the fact that said W. H. Stanley held said Contact mine as the tenant of said Atlantic Consolidated Mining Company and held the same as such tenant, at the time when these proceedings were commenced.

B. The evidence shows that said defendants, H. C. Biggs and Maggie Lee McMillan, acquired their interests in the undivided one-half of the Contact mine with full knowledge of the fact that Andrew Charles and Mielievich, their predecessors in interest and grantors, held the legal title to said Contact mining claim as tenants of the Atlantic Consolidated Mining Company, and had acquired the same while in the possession of the Atlantic Consolidated Mining Company, as its tenant.

C. The evidence shows that said tunnel was a part of and appurtenant to the Atlantic Consolidated mining claim; that it was constructed by said Atlantic Consolidated Mining Company and its predecessors in interest, and that it was constructed at a time when the land enclosed within the boundaries of the Contact mining claim was public land of the United States; and the evidence shows that said land is still public land of the United States.

D. The evidence shows that said tunnel is absolutely necessary to the defendants, Mulville and Byrnes, for mining and drainage purposes, in connection with and as a part of the Atlantic Consolidated mine.

E. The evidence shows that this defendant, (?) J. M. Douglass, and one Andrew Charles, who was his silent partner in said lease, and for whom Mielievich held the legal title to the Contact mining claim, entered into possession of said Contact mining claim and said tunnel, and said Atlantic Consolidated mine, as tenants of the Atlantic Consolidated Mining Company, and continued in possession thereof, as such tenants, until defendants, Byrnes and Mulville, and their grantors, acquired title to

said Atlantic Consolidated mining claim, when, by reason of such acquisition, said Douglass and Charles became the tenants of defendants, Byrnes and Mulville, and their grantors, and continued so until the time these proceedings were commenced.

F. That neither W. H. Stanley, F. A. Muhlbeier, nor J. M. Douglass, could, by reason of their relations as tenants to defendants, Byrnes and Mulville, and their predecessors in interest and grantors, acquire any adverse title either to said Contact mining claim or to said tunnel, as against their landlords.

II.

These defendants object to the second finding of the commissioners, on the ground that the said commissioners have and had no power to find any matter or thing with reference to the right of way except as to the ownership of the claims through which the right runs, and the just compensation to be paid to the owners of such claims; nor had such commissioners any power or authority to find that petitioners have the right to the exclusive use of such right of way, nor that, if the owners of said claims, or any of them, desire to use said tunnel they must either negotiate with said petitioners or proceed to condemn the same.

III.

Defendants object to the third finding on the ground that it is not supported by the evidence: The evidence shows that good pay ore extends through the Annie, Clinton, and Red Jacket mines, that it was in sufficient quantities to be of practical value, that the ore was wilfully and maliciously thrown away by defendant (?) Douglass, and

his employees, and that the ore thrown away was as rich, if not richer, than that taken out immediately adjoining the bottom, sides and top of the tunnel. Said finding three is based upon the opinion of witnesses, and not upon the evidence of those who know the facts, and it is directly contrary to the evidence, as the evidence shows that J. M. Douglass was repeatedly notified by the men employed to extend the tunnel through the Red Jacket, Annie and Clinton claims, that the ore was rich and should be saved, and he neglected to provide any means to save said ore, and, in effect, told the men to throw it away, and that, instead of the throwing of the ore away being of no damage to the owners of the mine, it was of great damage to the owners of the mine; the net value of the ore taken from the Red Jacket mine and thrown away being \$5,040.00, that taken from the Annie mine being \$1,140.00, that taken from the Clinton mine being \$4,900.00, and damages in these sums should have been awarded to the owners of the said claims respectively.

IV.

Defendants object to the fourth finding of fact on the ground that the evidence shows that the ore at the mouth of the tunnel is ore mixed with waste, and of no practical value by reason of its having been taken from the mine with the waste, and that 84 tons of ore were taken from the Red Jacket mine by J. M. Douglass and thrown into the creek.

V.

The fifth finding is not supported by the evidence and is contrary to law. The evidence shows that the right of way through the Contact, Annie, Red Jacket and Clinton

mines, is of damage to those mines and is of value, and compensation should be paid therefor. Such finding is contrary to law in that no person is permitted to take the property of another under such proceedings without paying a just compensation therefor. It is only by paying, or securing the payment of a just compensation, that any property can be taken for the use of another who is not the owner. The evidence shows that the said right of way through said mines is of great value.

VI.

The defendants object to the sixth finding on the ground that the value of the right of way through the Atlantic Consolidated mine is, at least, \$2,650.00, and that the compensation that should have been awarded to defendants, Byrnes and Mulville, for the 265 feet of completed tunnel, through the Atlantic Consolidated mine, in the sum of \$2,650.00.

VII.

The defendants object to the said report of the commissioners on the ground that the value of the 648½ feet of the Atlantic tunnel, after deducting all repairs made by J. M. Douglass, was and is \$5,500.00, and that sum should have been awarded to defendants, Byrnes and Mulville, and the right of way condemned, from the mouth of the tunnel to the west line of the Atlantic Consolidated claim, is of the value of \$5,500.00, which the commissioners should have awarded to the owners of the tunnel, Byrnes and Mulville.

VIII.

The defendants object to the report of the commissioners on the ground that they find that the defendants,

Biggs and McMillan, are the owners of an undivided one-half of the Contact mine and tunnel therein, and yet they award them nothing for the right of way through said mine and tunnel, when the evidence shows that the right of way through the Contact ground, and the tunnel in said ground, is of the value of, at least, \$2,500.00, one-half of which should have been awarded to Biggs and McMillan.

IX.

That said report is based entirely upon erroneous views of the law, and is in direct opposition to the evidence in the case.

Wherefore, notice is hereby given that on the 2nd day of October, 1894, at 11 o'clock A. M. of said day, at the courtroom of said Court, at Carson City, Nevada, or as soon thereafter as counsel can be heard, these defendants will move said Court to vacate, annul and set aside said report as to each and every tract of land, mining claim and premises described in said report or in the petition, and as to each and all of the parties defendant, except the South End claim and South End Company, and to grant a new trial as to each of said tracts of land, mining claims and premises, and as to each defendant except said South End claim and said South End Company.

This motion will be made upon the foregoing objections, upon this notice, upon said report, and upon all the evidence on file or taken in these proceedings and upon all the records in this case.

Yours, etc.,

W. E. F. DEAL,

Attorney for Defendants, except South End Mining Co.

To F. M. HUFFAKER and J. L. WINES,

Attorneys for Petitioners.

Order Denying Motion for New Trial, etc.

The motion of defendants was made upon said objections, and upon said notice, and upon said report, and upon all the evidence on file or taken in said suit or proceedings, and upon all the records in this case.

The said circuit court afterwards overruled said objections and denied said motion for new trial, by an order which is in the words and figures following, to-wit: District of Nevada, ss. In the Circuit Court of the United States for the District of Nevada, at a term thereof begun and held at Carson City in said district, on the 18th day of March, A. D., 1895. Present, the Honorable Thomas P. Hawley, presiding judge; the following proceedings were had and taken, viz: J. M. Douglass, et al., v. Jos. D. Byrnes, et al. The matter of the objections to the report of the commissioners herein, and the motion for a new trial having been heretofore argued and submitted and duly considered by the Court, it is now ordered, that said objections be and the same are hereby overruled, the motion for a new trial denied, and the report of the commissioners is confirmed. It is further ordered that the costs of this proceeding shall be paid by the petitioners; and that the compensation of the six commissioners shall be ten dollars per day, and incidental expenses, amounting to \$31.00, and \$8.00 for team to inspect the premises; also the sum of \$101.00 to Alfred Chartz for taking and reporting the testimony. It is further ordered that defendants have thirty days in which to file their statement or bill of exceptions herein.

And be it further remembered, that within the time allowed by law and as extended by the order of said circuit court, and as stipulated and agreed in writing by the attorneys of the plaintiffs and defendants respectively, came said defendants and made this, their statement on appeal and bill of exceptions in this suit, and says that the order and decree of said circuit court is erroneous and against the just rights of said defendants for the following reasons:

Bill of Exceptions and Statement.

First: The evidence showed that a part of the right of way sought to be condemned consisted of a tunnel which was owned by the defendants, James D. Byrnes and Edward Mulville, who were also owners of the Atlantic Consolidated mine, for the working of which said tunnel was constructed by the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville. The evidence showed that at the time of the commencement of this suit and proceedings J. M. Douglass, one of the plaintiffs, was in possession of said tunnel, as tenant of the defendants, Byrnes and Mulville. That said tunnel had, before the time when J. M. Douglass became said tenant been run and completed a distance of 648 feet from its mouth, and that said tunnel was a part of said Atlantic Consolidated mine, and was the lowest adit of said mine, and the most convenient means of working the same. And these defendants show that said tunnel was, at the time of the commencement of these proceedings and suit, already used by defendants, Byrnes and Mulville, and their tenants, for mining

purposes and defendants show that said tunnel was not, under the provisions of said act of the legislature, subject to condemnation for the use of any other persons, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose.

As pertinent to and explanatory of the foregoing specifications, defendants show that the following evidence was given before the said commissioners at their hearings and was used upon said motion for new trial by defendants. The defendants, Byrnes and Mulville, introduced and read in evidence a patent from the government of the United States of America, dated April 29th, 1876, conveying to the Atlantic Consolidated Mining Company, the Atlantic Consolidated mining claim upon the Pacific lode, described in the complaint and answer in these proceedings. Defendants also introduced and read in evidence a judgment of the District Court of the State of Nevada, rendered on June 24th, 1891, and entered on said day in an action then pending in said court, wherein J. D. Blackburn was plaintiff, and said Atlantic Consolidated Mining Company was defendant, in favor of said J. D. Blackburn, for the sum of \$1,132.00, besides interest and costs, against said last named company.

Defendants also introduced and read in evidence an execution afterwards issued out of the district court in which said judgment was rendered, tested the 26th day of June, 1891, upon said judgment, together with the sheriff's return thereon, to the effect that he, pursuant to said execution, and by virtue thereof, sold the

Atlantic Consolidated mine and premises described in the pleadings in this action, at public auction, to W. E. F. Deal for \$1,352.90, and that he, said sheriff, had given said purchaser, W. E. F. Deal, a certificate of said sale, and had filed a duplicate for record in the county recorder's office of Lyon county, Nevada. Defendants also introduced and read in evidence said certificate of sale, mentioned by said sheriff in his return, which certificate is dated July 25th, 1891. Defendants also introduced in evidence an assignment of said certificate of sale made by said W. E. F. Deal to William Feehan, dated January 16th, 1892. Defendants also introduced and read in evidence a sheriff's deed, dated February 16th, 1892, made by W. A. Donnelly, the sheriff of Lyon county, Nevada, who made said sale under said execution, to said William Feehan, which deed was made pursuant to said execution sale, certificate of sale and assignment, and which deed conveyed said Atlantic Consolidated mining claim and premises to said William Feehan. Defendants also introduced and read in evidence a deed dated March 19, 1892, made by said William Feehan to James D. Byrnes and James J. Green, for a valuable consideration, conveying said Atlantic Consolidated mining claim and premises. Defendants also introduced and read in evidence a deed dated February 25, 1893, made by said James J. Green, conveying to Edward Mulville his interest in said Atlantic Consolidated mining claim for a valuable consideration. Defendants also introduced and read in evidence the lease, a copy of which is annexed to the answer in this action. Defendants also introduced an assignment in writing of said lease dated September 16,

1891, made by W. H. Stanley, the lessee in said lease to Frank A. Muhlbeier, and also an assignment of said lease dated the date last mentioned, made by Frank A. Muhlbeier to J. M. Douglass, one of the plaintiffs in this action, each of which leases was made for a valuable consideration.

At the subsequent meetings of said commissioners the petitioners offered and read in evidence the notice of location of the Contact Gold and Silver mining claim, which is in words and figures following, to-wit:

Notice of Location.

I, the undersigned, hereby give notice that I claim fifteen hundred (1500) linear feet (more or less) measured on this lode or vein of gold and silver bearing quartz, commencing at this monument and notice which is placed one hundred (100) feet north of the American Flat creek, and running in a southerly direction therefrom along the line of said lode, fifteen hundred (1500) feet with the dips, spurs and angles of said lode, and three hundred (300) feet on each side thereof, the corners of my surface claims being marked by monuments of stone, under and by virtue the U. S. mining laws, and of the district; said claim shall be known as the Contact Gold and Silver Mining Claim, on the Contact lode in Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and is a relocation of the Cadiz claim, and is bounded on the north by the Big Gun, on the west by the Atlantic, and on the east by the South End claim, and on the south by unknown ground.

C. E. BROWN, Locator.

Dated on the ground, 7th, 1890. (?)

Recorded at the request of C. E. Brown, July 8th, 1890, at 20 minutes past 4 o'clock, P. M. Thomas P. Mack, County Recorder.

Also the deed from the locator, C. E. Brown, to W. H. Stanley and C. J. Millievich, which is in the words and figures as follows, to-wit:

This indenture made the 13th day of June, in the year of our Lord one thousand eight hundred and ninety-one, between C. E. Brown of Yuba County, State of California, the party of the first part, and W. H. Stanley and C. J. Millievich, of Virginia City, Storey county, State of Nevada, the parties of the second part, witnesseth:

That the said party of the first part for and in consideration of the sum of fifty dollars (\$50) lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents, does grant, bargain, sell, remise, release, and forever quitclaim unto the said parties of the second part and to their heirs and assigns all that certain mining claim situate and being in the Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and described as follows, to-wit: All that certain mining claim known as the Contact Gold and Silver Mining Claim, located by C. E. Brown, July 7th, 1890, and bounded and described as follows, to-wit: Fifteen hundred (1500) feet (more or less) measured on the lode or vein of gold and silver mining quartz, commencing at the monument and notice which is placed one hundred (100)

feet north of the American Flat creek and running in a southerly direction therefrom along the line of said lode fifteen hundred (1500) (?) with the dips, spurs and angles of said lode, and three hundred (300) feet on each side thereof, the corners of the surface claim being marked by monuments of stone under and by virtue of the U. S. mining laws of the district, the above described mine being known as the Contact Gold and Silver Mining Claim, on the Contact lode in the Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and is a relocation of the Cadiz claim, and is bounded on the north by the Big Gun, on the west by the Atlantic, on the east by the South End claim, and on the south by unknown ground. Notice of the location of the above described mining claim is recorded in book "A," page 99, of mining locations and assessment records in the recorder's office, Lyon county, State of Nevada. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver mining quartz, rock and earth therein; and all rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, in any wise appertaining, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as equity, of the said party of the first part, of, or in, or to the said premises, and every part and parcel thereto with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said

parties of the second part and to their heirs and assigns forever.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

C. E. BROWN. [Seal]

Signed, sealed and delivered in the presence of

.....

State of California, }
County of Yuba. } ss.

On this 13th day of June, in the year of one thousand eight hundred and ninety-one, before me, J. K. Hare, county clerk and ex-officio clerk of the superior court in and for the said county of Yuba, personally appeared C. E. Brown, personally known to me to be the same person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court the day and year in this certificate first above written.

[Seal]

J. K. HARE,

County Clerk and ex-officio Clerk of the Superior Court.

Filed for record at request of W. H. Stanley, June 16, 1891, and recorded in Vol. "H" of mining deeds, page 643, Lyon County records.

THOMAS P. MACK,

County Recorder.

Also deed from W. H. Stanley to Frank Muhlbeier, conveying an undivided one-half interest in the Contact

Gold and Silver mining claim, being identically the same ground conveyed by C. E. Brown to W. H. Stanley and C. J. Millievich, fully described in the foregoing deed bearing date September 16, 1891, duly acknowledged and executed by W. H. Stanley and recorded September 18, 1891, at request of J. M. Douglass, at 30 minutes past 9 A. M., in book "H" of mining deeds, page 681, records of the county of Lyon, State of Nevada.

THOMAS P. MACK,
County Recorder.

Also deed from Frank Muhlbejer to J. M. Douglass conveying an undivided one-half interest in the Contact Gold and Silver mining claim, being identically the same interest conveyed in the same ground by W. H. Stanley to Frank Muhlbejer fully described in the deed from C. E. Brown to W. H. Stanley and C. J. Millievich, already printed in the foregoing pages. Said deed from Frank Muhlbejer to J. M. Douglass bears date September 16, 1891, and was duly acknowledged and executed on September 16, 1891, and was recorded at request of J. M. Douglass, September 18, 1891, at request of J. M. Douglass at 10 o'clock A. M. in book "H" of mining deeds, page 683, records of the county of Lyon, State of Nevada.

THOMAS P. MACK,
County Recorder.

Petitioners also read and introduced in evidence the lease from the Atlantic Consolidated Mining Company to W. H. Stanley, which said lease appears in full in this statement on appeal and bill of exceptions at page 26.

Upon the hearing, the following testimony was given by witnesses, who, before testifying, were duly sworn:

T. P. MACK, a witness called on the part of petitioner on the hearing of the petition in the U. S. Circuit Court, being duly sworn, testified as follows:

I am a surveyor and civil engineer, and I am acquainted with the ground in controversy called the Goodman Contact tunnel and the ground through which it passes; I have surveyed it for Mr. Douglass, the petitioner from its mouth to the Goodman mine; it now extends 150 feet into the Goodman ground; I have known the Contact mine under that name three or four years; it was originally called the Cadiz; five or six years ago that ground became subject to relocation and I relocated it, and then I failed to do the necessary assessment work and C. E. Brown relocated it and called it the Contact.

Mr. Mack was subsequently recalled and testified as follows:

I have resided in Lyon county thirty-one years and have been connected with mining more or less during that time; I am acquainted with the Devil's Gate and Chinatown Mining District, where this ground in controversy is situated. The mouth of the tunnel in controversy is near the easterly line of the Contact ground.

I made this map shown me from actual surveys made by myself and from U. S. surveys of the patented claims in the neighborhood. That tunnel as laid down on the map represents the course actually followed from its mouth on the Contact to its end at that time in the Goodman ground. The tunnel passes diagonally through

most of the several claims as compared to their end lines. It follows a ledge formation after it gets in the ground a little ways from its face to the Goodman ground, all the way. The course of the ledge formation is the same as the tunnel—south of west. The ledge formation followed by the tunnel crosses the mining locations on the course of the tunnel diagonally. The tunnel enters the side line of the Atlantic and goes out of its side line, and also of the Annie; it enters the side line of the Red Jacket and passes out of its side line, and it enters the side line of the South End and passes out of its side line, and it enters the side line of the Clinton and passes out of the side line and enters the Goodman. With reference to other ledges that might be found running with the course of the locations made, the ledge followed by the tunnel might be called a cross-ledge.

There are places in the tunnel where the tunnel is timbered, and I could not see the ledge formation on that account. I think there is a ledge formation where they began the new work of extending the tunnel. Within the ledge there are spots that look like good ore. Some spots would pay to extract and work, but I don't think it is continuous. There are places for quite a distance in that tunnel where I don't think the ore would begin to pay to take out and mill, and there are other places that I think would pay, and the rule to take a certain length, width and highth, multiplied and divided by 13 to ascertain the number of tons of pay ore extracted in excavating the tunnel would not apply in taking the entire length of the tunnel. I don't know that I could make an estimate of the number of tons of pay ore extracted in running the tunnel, because I don't know the length of

the spots that would be pay ore. In the Annie ground I don't think half of the distance would pay; I don't think half of the distance would pay in the Red Jacket. As to the Clinton, I think possibly half of the distance would pay to extract. That would be my judgment from what I saw. I cannot give a definite opinion. I call it a spotted ledge.

These several mining claims had no marketable value in 1890, unless the Red Jacket and the Atlantic had ore that was developed in their former workings, and their value would be entirely speculative according to my idea. Since the construction of this tunnel, I don't think the marketable value of the Atlantic has been changed; I should say the Annie was worth more to-day with the tunnel; it is worth more now than it was before the ore was exposed in it, and I would say the same with reference to the Red Jacket and Clinton. A mine is usually considered more valuable and you can sell it to better advantage if you can go and show ore in it that will pay. It is my judgment that the running of that tunnel has benefited those mines.

Really, I don't see where any of those mining claims have been actually damaged, except to the extent of the pay ore extracted in running the tunnel. That would be the only way I would estimate the value of the right of way, by figuring the amount of pay ore taken out by the tunnel excavation, and I cannot see where any damage would accrue outside of that. When the tunnel was half way through the Annie, the land was unappropriated and vacant, and subject to location by any one, and it had no marketable value, and I would say the same of the Clinton; the Red Jacket was a mine for a long time and the

parties had a perfect title to it. The damage to that mine would be the amount of pay ore taken out. I would pay more for those claims now than I would before the tunnel was excavated through them. I can see no damage can result to the Annie by the appropriation of $7\frac{1}{2}$ feet square of ground as a right of way for the tunnel, or to the Jacket or the Clinton.

There is an eight-inch drain pipe follows the tunnel in its construction, and it will drain out of that tunnel 34.8 miner's inches. I think it would answer every purpose of drainage.

There is nothing in the construction of that tunnel that would prevent the extraction of the ores found in the several claims through which it passes, and running the same out of the tunnel in mining cars.

I was present in the tunnel when Judge Blackburn, J. F. Angell, Mr. Ray and Mr. Lacrouts were there taking samples. Mr. Angell picked the rock down, and Judge Blackburn put them up, and Mr. Ray had the sacks and I marked them where they were taken. The samples were taken only where the ledge showed in the tunnel, and none were taken from barren places; I understood it to be their object to get a fair average of the value of the ore shown in the tunnel, and I think they selected them that way. I think if they had taken the samples at shorter intervals that the average value shown by them would have been lower. We skipped places on account of the ledge being barren. I cannot form any estimate of the value of the ore taken from those mines or any of them by the excavation of the tunnel. The ledge shows in the roof of the tunnel and sides and bottom in

some places, and in some places it is good and in other places it is worthless, and I don't know the proportionate length of the good or of the bad places. The general dip of the ledge is perhaps 50 degrees from the horizontal.

I made the survey for the Annie location. I never saw any croppings on it; I never went over the entire surface of the Annie ground; I went around the boundaries. The location was made to take an unoccupied and unappropriated piece of ground lying between the Big Gun, and the Red Jacket, South End and Atlantic. There is an immense outcrop on the Clinton ground above the railroad track, and it is partly on the Goodman, Red Jacket and Clinton ground. It is a large and nearly circular outcrop.

I don't think the value of all the ore taken out by the excavation of that tunnel would be as great as the increased value of the mines by reason of the ore discovered by the running of the tunnel.

Cross-Examination of Mr. Mack.

Under cross-examination by Mr. Deal, Mr. Mack testified:

I don't think any human being can tell what the value of the ore was which was taken out by the excavation of the tunnel.

At the time I made a survey of the Annie for Mr. Biggs, I showed him where the ledge was in the Atlantic incline. It was a ledge of gold and silver bearing quartz in place. I showed Mr. Biggs where Tinney had worked on the Annie ground, and I presume there was a ledge

there. There is a ledge shown in that tunnel within the Annie and Clinton, and in the Atlantic incline. It runs across the Atlantic, Annie and Clinton. I think it is all the same ledge.

I never made a complete survey of the Atlantic; I surveyed the upper tunnel, and I know three tunnels there; the tunnel through which right of way is sought to be condemned is the lowest tunnel through which the Atlantic ground can be worked; that tunnel is necessary to the working of the Atlantic as a drain tunnel. I think most of the water coming out of the tunnel now comes from the Atlantic ground.

I have no doubt but that the tunnel on this diagram marked "Tunnel" is the very same tunnel that Douglass took as part of his right of way.

The Cadiz claim and the Atlantic Consolidated Mining Company's claim constituted the property of the corporation; in consequence of their failure to do work on the Cadiz claim, I made the location; when I made the location J. D. Blackburn was in possession of the mining claims holding them for the Atlantic Consolidated Mining Company as watchman; it was located in my name and it was understood between us that he was to be interested in it; he said it was vacant and I located it.

If more than 34.8 inches of water was to be struck, that 8-inch pipe would not carry it off; a sufficient rush of water would tear the tunnel down and the timbers and destroy the tunnel.

We tried to get a sample every thirty feet; if we found the tunnel timbered we would go a few feet further or step back a few feet, and if it was barren we would do

the same thing. We commenced sampling at the ledge and tried to get a sample every thirty feet. If I was buying a mine I would prospect and sample the richer places, and put no valuation on the balance; I would measure the length and width and height of the ore in sight, and get as good an average as possible, and average the value of it; there is no other way a business man would buy a mine, except in the way I have described. It is possible but not probable that between the points where samples were taken richer ore could have been got. If a certain grade of ore showed at the top and at the bottom of the tunnel it is presumable that the same kind existed between, and if it was barren above and barren below it is probable it was barren between, in the tunnel itself.

Assuming that Byrnes and Mulville owned the first 648½ feet of constructed tunnel, it is no advantage to them that Douglass took that constructed tunnel and paid them nothing for it; it is an injury to them; it is an injury to them to the extent of the cost of the tunnel if they needed the tunnel; they needed the tunnel for drainage purposes, and I think they needed it if they built it.

If a man owned a piece of mining ground, and I wanted to run a tunnel through it to reach my own ground, I would go to the owner and make my arrangements.

Redirect Examination.

Mr. Mack testified, on redirect examination by Mr. Huffaker, as follows:

I made a memorandum of the places where the samples were taken, and it fairly represents the average value of the ore in that ledge as followed by the tunnel from one mine to the other. The ledge is continuous but

not the pay. There are stopes where ore was taken out of the Red Jacket for less than one-half of the entire distance. I could not form any estimate of the value of the ore taken out of those stopes, but a man naturally works where he can get the most money in the shortest time with the least labor.

Q. I will ask you to look at your map for a moment—what location upon the ground does that patent indicate?

A. It indicates lot No. 111, as marked on the map in yellow.

Q. Does the patent include anything else in its description except what is in yellow on the plat?

A. I can tell by reading it.

Q. Does the coloring determine the ground or the description in the patent?

A. I should judge the coloring there would describe it.

Q. I will read you the description in the patent: Beginning at a post marked No. 1, U. S. survey No. 111 from the southwest corner of section 8, in township 16 north, of range 21 east, Mount Diablo meridian bears south 41 degrees, 15 minutes west at a distance of 3172 feet; thence from said post south 82 degrees east 200 feet to post marked No. 2, U. S. survey No. 111; thence south 8 degrees west 1800 feet to post marked No. 3, U. S. survey No. 111; thence north 82 degrees west 200 feet to post marked No. 4, U. S. survey No. 111; thence north 8 degrees east 1800 feet to place of beginning, containing 8.26 of an acre of land, more or less, and embracing 1800 linear feet of said Pacific lode, to-wit: 600 linear feet northerly and 1200 linear feet southerly from discovery stake on said lode as represented by yellow shading in the following plat:

Q. Is the tunnel included within those boundaries?

A. The tunnel is not within those boundaries as called for by those courses and distances.

Q. Is the Contact claim included within those boundaries? A. No, sir.

Q. When the description says that the claim is represented by the yellow shading, does not the yellow shading show what is claimed?

A. The surface of the claim is embraced in the yellow shading, and that yellow shading does not embrace either the Contact claim or any part of it, or the mouth of the tunnel in dispute here. If it had done so I could not have relocated the Cadiz claim.

Q. Is it the practice of engineers and surveyors in platting claims upon which patents are issued to mark other objects upon the plat in connection with the ground patented?

A. It is necessary that other objects should be marked, such as ravines and surroundings for purposes of identification.

Q. And it is not for the purpose of describing any other ground?

A. I don't understand it as such.

Q. Have you not often seen and made yourself maps for patents and the government would issue the patent and color the surface of the ground patented and other claims in the neighborhood of it?

A. Yes, that is frequently done; I can show you where contiguous claims were so marked, and I presume it is done for the purpose of identification. Other patented claims will be indicated on the map as well as the claim that is being patented.

In answer to a question by Mr. Wines, witness said the barren spots predominate in extent throughout the tunnel.

Examination by Mr. Deal.

Q. Is not it common for surveyors when making a survey and platting a claim on application for patent to lay down the shafts and tunnels, by doing which work the party was entitled to patent? A. Yes, sir.

Q. A party applying for patent has to show that a certain amount of work has been done upon his claim before he is entitled to patent? A. Yes, sir.

Q. You have no doubt in the world that the tunnel in dispute here was laid down on that map by reason of the fact that the party applying for patent had to show that he done the necessary work to entitle him to patent?

A. Yes, sir; the tunnel as now constructed actually reaches the ledge, and it runs continuously for several hundred feet beyond.

Q. If you had surveyed that claim on application for patent, and if as a matter of fact the Atlantic Consolidated Mining Company had run that tunnel as part of their work, would you have put that tunnel down as it is?

A. Yes, sir.

Q. When you located the Contact, did you claim that tunnel as part of your location?

A. A man in locating ground——

Q. Did you claim that tunnel when you located that ground—did you claim that you acquired any right to that tunnel when you located that ground?

A. No, sir.

Q. You know who that tunnel belonged to?

A. I will tell you why I located.

Q. I don't care why you located. I am asking you whether when you located the Contact you claimed this tunnel?

A. I claimed anything I could hold under the location.

Q. Did you claim that tunnel as a matter of fact?

A. In locating the ground I claimed the ground and everything appertaining to it.

Q. You knew when you made that location that Judge Blackburn was the watchman of the Atlantic Consolidated Mining Company? A. Yes, sir.

Q. Do you mean to say that in view of that fact that you claimed that tunnel by virtue of the location of the Contact?

A. I did not understand that Blackburn being the watchman held the property by that fact alone.

Q. You knew that he was put in charge of the property for the Company?

A. Yes, sir; I also knew that a man could not hold ground as a mere watchman without doing the necessary work upon it.

Witness further testified:

The tunnel penetrated the ledge of the Atlantic and the Atlantic ground before he made the location of the Contact.

The cost of putting the tunnel in working condition ought to be deducted from the cost of original construction and the difference paid for the right of way as a proper reimbursement for the use of what had been done in the tunnel. I think the tunnel could be run for \$5 or \$6 a foot at the prices they take contracts to run tunnels at Silver City for the present time, and the price of clean-

ing the tunnel and putting it in repair should be deducted from that. Whatever it might cost to repair the 265 feet of tunnel run in the Atlantic ground I would deduct from the cost of the right of way and cost of excavation, which I would fix at \$5 or \$6 a foot. If the Atlantic Company desired to work their ground through that tunnel it would have been necessary for them to have repaired the tunnel before they could do it, and it would cost them as much as it cost the parties who did the work.

J. D. BLACKBURN, a witness called on the part of petitioner, testified as follows:

I have lived over 21 years in Silver City, and have engaged more or less in mining during that time, and I am acquainted with the Devil's Gate and Chinatown Mining District, and the mining locations there; I know the tunnel in controversy running from the Contact to the Goodman mine. I knew it first in 1872 and have known it continuously since. It was in something near 300 feet in 1872. In 1878 the tunnel had been run a great deal further than I first spoke, and it all caved to a certain point. I never was in any further than the cave. It was something like 400 feet in where the cave stopped the tunnel up. Prior to 1891, when Douglass took this tunnel there had not been any work done in it since 1882.

I know the Annie, Atlantic, Red Jacket, South End and Clinton; the only value any or all of those mines had then was a speculative value.

Leaving the question of ore taken out by the excavation of the tunnel, it is worth nothing for right of way through the claims through which the tunnel runs seven and a half feet square. If I was interested in those mines

through which the tunnel runs, I would say it done me good to run the tunnel if they found anything, and if they found nothing it could do me no harm, because there is nothing there, and it might save me money trying to find something myself. The tunnel run through there was of advantage to those mines, because it developed their property without expense to the owners. The running of the tunnel was worth to the owners of the mines through which it ran about ten times what the value of the ore taken out by the tunnel was. There was nothing there to take out to amount to anything. I don't see anything left there that is worth anything in sight in that tunnel, and that is a pretty good sign they didn't strike anything that was worth taking out. I recently made an examination of the tunnel with Mr. Angell, Mr. Mack, and Mr. Ray, and we took samples and I had assays made of them. The first sample was taken within one or two feet of the Annie line. Mr. Angell had a pole pick and dug the samples down from all over the ledge, and I picked them up and put them in sacks, and Mr. Ray from Dayton marked the sacks, and Mr. Thomas P. Mack had a note book, and he marked where the samples were taken from, and we paced off ten steps for each sample, but if there was no ledge or ore there at the end of each ten steps, we would have to go further until we got to the ledge; we didn't take any samples except from places where there was a ledge. We endeavored to get an average of the value of the ore; there is places where the ledge is barren; I think we took fair samples. It is a spotted ledge, and it is barren in places in the Annie, Red Jacket, and Clinton mines. The samples show the ledge to be

worth more than it is, if anything. There was very little pay ore taken out of the tunnel, if any. I have made a memorandum of these assays from these samples.

I have struck an average of the width of the ledge and of the ore followed by the tunnel, in my opinion, counting the barren places where there is no quartz, and I count three inches of solid quartz in one solid body. I figure it out to be about three inches, allowing for the barren places where there is not a particle of ledge at all; I don't believe it is over three inches of solid quartz. I have the statement here written out, and it is my honest judgment that it is a correct calculation of the matters it contains. I have stated the matter thoroughly, and I don't believe anybody can show anything more than I have shown in that statement.

Examination by Mr. Deal.

I swore in the District Court that I knew Yule, the Superintendent of the Atlantic Consolidated Mining Company, and that he worked the Atlantic claim through the other tunnels and through the lower tunnel, too, and it is true. That was in 1878.

Memorandum of J. D. Blackburn.

To the Hon. Board of Commissioners appointed by the U. S. District Judge to assess damages, if any, caused by J. M. Douglass in running tunnel through the Annie mine, Red Jacket mine and Clinton mine:

The following is the best judgment of the undersigned as to width of ore in the several mines passed through and the amount of ore taken out and the value thereof in

round numbers allowing the gold ore to mill 100 per cent and silver at 100 cents on the dollar. In the Clinton mine, you will notice that silver predominates, which must be considered. I have examined the ledge personally and taken samples from all of the above said mines and have had them assayed. The result of said assays accompany this report for your inspection.

Annie Mine, Average Width of Ledge Three Inches Solid Quartz.

	Gold.	Silver.	Total.
Assay No. 1.....	\$18 08	\$3 77	\$21 85
Assay No. 2.....	1 50	1 13	2 63
Assay No. 3.....	4 51	7 54	12 05
Assay No. 4.....	3 01	1 88	4 89
Assay No. 5.....	3 76	75	4 51
Assay No. 6	4 51	94	5 45
			<hr/>
			\$51 38

Divided by 6.

Length of tunnel, 265 feet.

Width of ledge average three inches solid quartz.

In many places no ledge visible, only a seam with clay to indicate where the ledge runs; allowing 13 cubic feet to the ton solid quartz unbroken, making 38 tons of ore in the Annie mine, at \$8.56 per ton, total value..\$325 66
 Less cash for milling and hauling..... 256 30

Net cash... ..\$ 60 16

Red Jacket Mine.

	Gold.	Silver.	
Assay No. 1.....	\$24 11	\$4 33	\$28 44
Assay No. 2.....	6 02	2 45	8 47
Assay No. 3.....	9 04	4 14	13 18
Assay No. 4.....	9 04	5 09	14 03
			<hr/>
Total.....			\$64 22
Average.....			16 05

Length of tunnel, 91 feet. In many places no ledge visible. Average width of ledge 3 inches solid quartz unbroken.

Allowing 13 cubic feet unbroken quartz to the ton, making 8½ tons of ore at \$16.05 a ton makes.....	\$136 42
Cost of milling and hauling.....	57 38
	<hr/>
Net cash.....	\$ 79 04

Clinton Mine.

	Gold.	Silver.	
Assay No. 1.....	\$ 6 02	\$ 8 29	\$14 31
Assay No. 2.....	18 09	23 37	41 45
Assay No. 3.....	13 55	6 78	20 33
Assay No. 4.....	0 37½	0 56	0 93·2
Assay No. 5.....	0 75	0 94	1 69
Assay No. 6.....	0 37½	0 56	0 93·2
Assay No. 7.....	1 50	0 75	2 25
Assay No. 8.....	0 75	0 56	1 31
			<hr/>
Total.....			\$83 21
Average.....			10 40

Length of tunnel, 227 feet. Average width of ledge 3 inches, allowing 13 cubic feet to the ton of solid unbroken quartz, making 33 tons of ore at \$10.40 per ton. .	\$343 20
Less hauling and milling.	231 45
	\$121 45

It is only the bunches or well defined parts of the ledge that can be taken out as pay ore, so as to take it clean without too much waste. Where there is nothing but ribbons of ore it is impossible to save it, no matter who takes it out. Then again I have given in making up the amount of ore in the ledge $7\frac{1}{2}$ feet in hight, when in reality it is nothing of the kind. For illustration: The ledge appears at the top of the tunnel on the right-hand side and pitches to the left side at an angle of about 40 degrees. The ledge if in ore would not be over five feet at the most liberal estimate. So you see there would be $2\frac{1}{2}$ feet lost in my estimate which I have given credit for in my 3 inches of solid quartz as the estimate. In loose quartz as it is in this case it may possibly be $4\frac{1}{2}$ or 5 inches, but I figured it from a solid quartz basis, 13.05 cubic feet to the ton, 166 pounds to the cubic foot, and 2000 pounds to the ton.

Now, gentlemen, this is my best judgment in this matter after carefully inspecting the mine, having no claims as an official expert on mining, but only as a miner.

I am respectfully yours,

J. D. BLACKBURN.

MR. BLACKBURN was subsequently recalled and testified as follows:

I should think this tunnel was of great value to the mines instead of being a damage to every one of those

claims. In the first place, in the Clinton ground the tunnel must be 400 feet deep there. That tunnel has cut a ledge in the Clinton 400 feet below the surface, and I should consider that a valuable discovery for the Clinton mine. The South End is the next, and they discovered a ledge there, which is demonstrated to be the same ledge, because they have followed the same ledge all the way; next they discovered a ledge in the Red Jacket, which is the same ledge, and the Red Jacket Company never knew they had that ledge to my certain knowledge, because I had charge of that property for 15 or 16 years and done all the work and never knew anything about it. The next is the Annie, they found a ledge in there. It was at first called the West Atlantic, and that is where the Atlantic Consolidated came in. It was afterwards located and called the Annie. They discovered a ledge there that they never knew anything about. In the West Atlantic they had a tunnel, too. It was run from the Atlantic Consolidated to the Annie ground.

If you had to run a tunnel to the Clinton to get the ore it would not pay to do it. I should consider the advantage to the mine largely in excess in value to the value of all the ore they could possibly have taken out by running the tunnel. In the first place it has been proved by that tunnel that they have a ledge in there 400 feet deep, and on the croppings of the Clinton there was some very rich spots taken out years ago, and the tunnel has demonstrated that the ledge runs down, and by going deeper it may make into a larger ledge, and I consider that a great advantage to them.

This tunnel in 1891 was open for 430 feet, and there was

some little spots that was caved, and you could get in it well enough. I have been in hundreds of times. There has been no work done in that tunnel since 1882. The last work done there was done in a new tunnel on the Atlantic mine in 1887, by John Yule, its superintendent. I worked for him as foreman and bookkeeper, and we worked that year about six or seven months. We run the new tunnel in 395 feet.

Cross-Examination.

Mr. Blackburn testified in cross-examination as follows:

Q. You were in possession of this very tunnel in controversy at one time for the Atlantic Consolidated Mining Company as its watchman?

A. No, sir. It was the upper tunnel I was in possession of. I was in possession of the tunnel on the Atlantic ground, and I was not in possession of this tunnel on the Contact.

Q. Didn't you testify in the case tried in the District Court of the State of Nevada, Storey county, in the action entitled James D. Byrnes and Edward Mulville against J. M. Douglass, on behalf of the plaintiffs in that case?

A. I believe I did.

Q. I wish you would listen to this testimony, and I will ask you if you did not so testify in that case: "Q. Afterwards this corporation that you got judgment against as watchman of their property, they became possessed of the lower tunnel as succession in interest of the parties who run the tunnel? A. Yes, sir."

Q. Didn't you so testify in that case?

A. I suppose I did.

Q. Was it not for that work you got judgment against the Atlantic Consolidated Mining Company, watching their property? A. Yes, sir.

Q. Didn't you further testify as follows in that case: "Q. When you went there as watchman for this company did you take possession of the lower tunnel for them and take care of it?"

A. Yes, I was in possession of that tunnel and their other property from the first of February, 1887, until I commenced suit against them for my wages." Didn't you testify to that?

A. I will answer it by a little explanation. I know I disagreed with you about that on the last commission. I had already located this Cadiz ground were the tunnel stands with a party and this all came in the suit, and I lost money, I presume which Mr. Deal knows very well, and as well as anybody, by taking some timbers out of an old shaft, and the jury charged me \$1,000 for doing it, and I say they claimed that tunnel, but they never owned it, because I had located it with Mr. Mack and Mr. Brown, and they never owned that tunnel.

Q. My question is did you testify as I have read to you?

A. I don't know; I can't explain for that testimony; that testimony was never read over to me after I gave it, and I don't know; there is some mistake about that.

Q. Were you not called as a witness by Mr. Byrnes and Mr. Mulville to prove that very thing?

A. I was, yes; you understand that as well as I do.

Q. This action was commenced by Byrnes and Mul-

ville against J. M. Douglass to recover possession of this tunnel—this lower tunnel? A. Yes, sir.

Q. And you were called as a witness to prove that you had possession of that tunnel for them?

A. Yes, and I testified that they claimed it. But I had located that very ground myself with other parties, and they never owned that tunnel.

Q. You testified in the former proceedings before the former commission in this action, and you are the same J. D. Blackburn named as a witness in that proceeding?

A. Yes, sir.

Mr. Deal now offers the testimony of J. D. Blackburn given in the District Court, Storey county, Nevada, in the case of J. D. Byrnes and Edward Mulville against J. M. Douglass, from which he read to witness.

ALFRED CHARTZ, sworn in behalf of defendants, testified that he recognized the typewritten volume read from as a book he printed from his shorthand notes; that he reported the testimony of J. D. Blackburn correctly, according to the best of his ability and transcribed the same correctly according to the best of his ability, and that he had reported in shorthand the case mentioned by Mr. Deal in his cross-examination of Mr. Blackburn in the District Court, Storey county, Nevada.

F. S. LACROUTS, called on behalf of petitioner, testified as follows:

I have resided in Silver City since 1860, and have been engaged in mining work since, and I know the Contact-Goodman tunnel. I have examined the ledge followed by that tunnel recently; I have been there four times.

From where they began excavating the tunnel in virgin ground from the end of the tunnel where it had been run before Douglass commenced work, it is a nice formation, full of seams and little bunches of quartz, and some of it would probably pay something. It is not continuous ore, but occurs in pockets and bunches. Some places the tunnel takes the full extent of the ledge and some places would pay and other places would not pay to take out.

Since the tunnel has been run they have been in there and took some ore out, and the value of those mines is better than before the tunnel was run.

I think the tunnel cost more than the rock was worth that was taken out. The tunnel adds more to the value of the mines through which it runs than the ore taken out in running the tunnel.

The first I knew of that tunnel was in 1861 or 1862. Some parties located the ground and built a little house on that flat above the tunnel, and then these parties, Jim McGinnis and Bob Buzan, they run the tunnel to get water to fetch to Silver City, and by and by they sold it to the Water Company, or the Atlantic Company, I don't know which.

I think Buzan and McGinnis run this tunnel about 300 feet to the Atlantic ledge, but I didn't see it. They discovered the Atlantic ledge in running this tunnel for the purpose of getting water.

I think the last work done in that tunnel was in 1880 or 1881; I think now it was sometime in 1882.

Leaving out of the question the value of the ore taken out in excavating the tunnel, it is not worth anything

to the companies through whose mines the tunnel runs to run the tunnel seven and a half feet square through their ground. In my judgment the value of the right of way through any of these claims, the Annie, Red Jacket and Clinton is worth only what the ore they may have taken out in running the tunnel is worth.

I consider the running of a tunnel through a mining claim a benefit to such claim, always.

MR. LACROUTS was subsequently recalled and testified as follows:

I have known the tunnel in controversy since 1864 or 1865. Not all the time, but the best portion of it. There was a party I suppose run it to prospect in early days, and Bob Buzan bought that tunnel for water purposes, and McGinnis. Part of the water for Silver City came from that tunnel. They used that tunnel for water purposes until the present Virginia & Gold Hill Water Company bought them out. I was told they had sold their right to the Water Company. They did not carry on a water business there after that. The Atlantic Company took the tunnel and I suppose they bought their right.

The effect of the construction of this tunnel on the claims through which it passes has been good, only they fight ever since.

I think the benefit derived by these claims from the running of the tunnel is more and of greater value than all the value of the ore that may have been taken out by the running of the tunnel.

I call the ledge a gouging proposition, with little pockets here and there, and they have to sort the rock to make it worth anything.

Cross-Examination.

Mr. Lacrouts testified as follows on cross-examination by Mr. Deal.

I am the same Lacrouts who testified before the former commissioners in this action in the former proceeding. After McGinnis and Buzan stopped work in the tunnel they were succeeded by the Atlantic Consolidated Mining Company. The Atlantic Company continued to run the tunnel in further for a long time after they succeeded McGinnis and Buzan. I never heard of anyone claiming the tunnel after McGinnis and Buzan left until I heard it was claimed by J. M. Douglass.

I know John Yule, the superintendent of the company, worked in that tunnel for a long time for the Atlantic Company, and I know a party named Myers worked in there, too.

Q. Listen to your testimony given in the District Court, Storey county, on the trial of the case of James D. Byrnes and Edward Mulville against J. M. Douglass:

“Q. Don't you know the fact that J. M. McGinnis and R. C. Buzan claimed a lode they called the Pacific lode, and they called the company locating that lode the Atlantic Consolidated Mining Company? A. Yes, I believe so.”

Is that your testimony?

A. Yes, I know because they showed me the ledge.

Q. Don't you know that they claimed the lode up there in that tunnel and called it the Pacific lode?

A. I know they located a lode up there, but I don't recollect the name of the lode.

Q. I will read to you to refresh your recollection: “Q.

They located this lode at the same time they were working there in the tunnel? A. Yes, and in the same tunnel." Is that correct? A. Correct.

That tunnel was always a drain and mining tunnel for the Atlantic Company. I know Judge Blackburn sitting by my side, and I know he had charge of the Atlantic Consolidated Mining Company's claim and of this tunnel as watchman for years. He sued the company for his services and recovered judgment.

F. M. HUFFAKER testified on behalf of petitioner as follows:

In the transfer of the lease of the Atlantic Consolidated Mining Company to Mr. Muhlbeyer, Mr. Stanley asked me if he could assign his interest in the lease to Mr. Muhlbeyer, and I told him he could assign anything he owned, but there was nothing said by anybody about anybody owning any interest in the lease or in the Contact mine, or about Mr. Stanley holding it for anybody except himself. He never asked me anything about any mining claim at all.

Cross-Examination by Mr. Deal.

Q. Were you instructed by Mr. Douglass to conceal the fact from Mr. Stanley that he (Douglass) in fact was the real purchaser and not Muhlbeyer?

A. No, sir; Mr. Muhlbeyer spoke to me about it and said Douglass sent him to me.

Q. You did not know when you drew up the papers that Douglass was putting up the money?

A. I learned that fact from Muhlbeyer.

Q. Did you learn that fact before the transaction was completed?

A. Yes, he told me he was sent by Douglass to buy the Contact mine and that the lease would be transferred, and that is all he told me.

J. M. DOUGLASS, called upon the part of the petitioner, testified as follows:

I am the owner of the Contact Mining Claim under the conveyance from Frank A. Muhlbeier, which has been introduced in evidence. I constructed the tunnel from the Contact to the Goodman mine, having repaired it part of the way and constructed the balance. My object was to reach the Goodman mine and work the ledge there, and do general mining work.

I know W. H. Stanley. I have no recollection of ever having had any conversation with Stanley about transferring the lease he had of the Atlantic Consolidated Mining Company to myself. Neither Stanley, Andrew Charles or Muhlbeier ever told me that Andrew Charles had a half interest in that lease. I never had any conversation with any of them about that prior to the transfer. I got the lease from Frank A. Muhlbeier. Prior to the transfer of the interest in the Contact mine to myself I don't think I ever had any conversation with W. H. Stanley about any such transfer. Neither Stanley or Andrew Charles ever told me that Stanley held the Contact mine for the Atlantic Consolidated Mining Company. I never heard and never knew from any source that such was the case prior to the transfer.

Andrew Charles testified falsely right then and there when he testified that the only relations he ever had with me was business propositions and there was no friendships or friendly acts between us. Some years ago

he came to me and asked me to buy the Gold Lead mine on Cedar Hill, and he asked me to bid it off at sheriff's sale for him, which I did. Another time he wanted a contract to clean off the Papoose mill and wanted to get some water from Stevenson, and Stevenson disliked him so much that he didn't want to have anything to do with him, and I was friendly with Stevenson and Charles knew it and he came to me and asked me to see Stevenson, and I did and Stevenson let him have the water. I paid his expenses to go to the Mount Cory mine beyond Hawthorne.

In the construction of this tunnel I let the work out to parties on contract. I told them it was not worth their time to pick out little ore, when it was so small it would not pay to save. I never told Powers to throw pay ore and good ore away. I don't recollect that any of the men ever told me there was pay ore that ought to be saved, but some of them said there was pay ore there in spots. I have been in the tunnel very seldom. I don't know but this man Charles had something to do with representing me when the work was being done; but I generally took their word for it, and if they said they had run 100 feet or more I would pay them. There is a little ore at the mouth of the tunnel now which was saved by the men; I don't know how much there is; I am not a judge of such things.

Cross-Examination.

Mr. Douglass testified under cross-examination by Mr. Deal as follows:

I understood before I purchased this interest in the Contact and purchased the lease from Frank A. Muhl-beyer that Stanley had the legal title to the Contact in

his name and also had the lease. I employed Muhlbeyer to buy the Contact and get the assignment of the lease for me. I furnished the money that was paid for it. I employed Mr. Huffaker to draw the papers and to attend to the matter for me.

MR. DOUGLASS subsequently testified as follows:

I am acquainted with the several mining claims traversed by the tunnel in controversy in Silver City. I am the owner of the Goodman mining claim. I first worked on that claim in 1889 or 1890. I first worked in the shaft, and then abandoned the shaft on account of water, finding it inexpedient to work that way, having no machinery to handle the water.

I purchased an interest in the Contact mine in September, 1891. At that time Andrew Charles and I were doing a little work on the Atlantic ground above this lower tunnel—considerably above it; we were working there under a lease; the lowest work we done under the lease was about 70 feet above this lower tunnel. There was no work being done in the lower tunnel when I bought the interest in the Contact; there was a location of the Contact made by a man named Brown, and Brown conveyed to Stanley and Millievich, and Andrew Charles claimed that the Millievich interest in the Contact was for him. Charles may have had some conversation with me about the interest that Stanley held in the Contact claim prior to my purchase of that interest. He may have told me that Stanley owned a one-half interest in the Contact. There was not a word ever said to me about Stanley holding that one-half interest as a trustee or in trust for the

Atlantic Consolidated Mining Company prior to the purchase.

I purchased that interest in the Contact ground for the purpose of running the tunnel from that point to the Goodman mine or ledge, and for the purpose of working the Goodman mine through it, as it could not be worked to any advantage any other way. It was also for the reason that the tunnel was already started in the Contact ground. There was a tunnel there that was badly caved down, and in very bad shape, and it cost nearly as much to clean it out as to run a new tunnel, but that being the nearest point to run to the Goodman mine or ledge, I bought that interest.

I don't think it cost quite as much to put the tunnel in repair as it cost to run a new tunnel, but it might have cost as much; the tunnel was in very bad condition when I took possession of it. There was no track, but we found some pieces of track under the caves, I believe. The timbers were rotten and there was nothing upon which to lay a track, and there was nothing in the tunnel except caves. It was badly caved and all the timbers were rotten and useless and nothing could be used in it. It was of no use in the world to any of the mining claims for the purpose of working them. It could not be used for any purpose whatever, and so far as I could see it was abandoned and it must have been abandoned for many years, judging from the rotten condition of everything we found; what few timbers were left in the tunnel were rotten, and I believe there was no iron; the track had been taken up and the pieces of wood it had been laid on was rotten and could not be used for any purpose.

There was no one there holding possession of this tunnel and there could not have been anyone at work in that tunnel for many years.

In my view, prior to September, 1891, the mining claims on the line of this tunnel as mining properties had no value whatever.

Before I commenced operations there I believe I spoke to Mr. Green about a tunnel they had there, but I understood at that time it was a tunnel upon their own ground and not a tunnel off their ground and on the Contact ground where I found this tunnel.

I might have told Charles before I got the tunnel what I wanted it for and he helped me to get it. I might have said to Charles that I wanted it for the purpose of running a tunnel in that ground, as he owned an interest in the Contact. Charles first worked in the Atlantic ground under a lease I got from Stanley. I don't think he then knew I wanted to drive a tunnel through that ground, as I never talked to him about running a tunnel through there, and I never talked to anyone about what I wanted.

I took the lease of the Atlantic ground for the reason that Charles wanted to work the ground. I didn't want the lease for myself, but I took it myself and told Charles he could have that lease, and work the ground under it.

I went into possession of the Contact ground and the tunnel under the deed from Stanley. I never told James H. Brown in the world that I took possession of the Contact and of the tunnel under the lease of the Atlantic ground from Stanley. I have no knowledge of ever having had any such conversation with Mr. Brown.

During the excavation of the tunnel there was some ore taken out, and it is lying at the mouth of the tunnel now.

unless it has been removed since I was there last. I don't know where it came from in the tunnel; it was little jags of ore that the men encountered in running the tunnel and they thought it might pay to save, and they dumped it to one side of the tunnel at the mouth; I don't think there is over four or five tons of it there, and it came out from pretty well back from the mouth of the tunnel. I don't think we saved or found any ore in the Annie ground at all. However, I was nearly through the Annie ground with the tunnel when Biggs and Charles went ahead of me and made a location of it. They knew I was working in the tunnel in the Annie ground at the time they made their location, because they went into the tunnel in the Annie and found a streak of ore in there, and then they went on the surface and located the ground. I understand that Charles was then interested in the Contact. I believe the record shows he was also an owner in the Annie ground and claimed with Biggs.

I drove the tunnel in the ledge because it was easier to run in the ledge for the men working there than out of it. The men asked me if they could follow the ledge, and I told them if they did not digress too much from a straight course they could, if it was of any advantage to them. I do not believe I could have got anybody to take the contract to run the tunnel at the same figures if they had to run in the country rock.

I have no knowledge of making any demands of Mr. Biggs or of the company for the use of the tunnel; I have no knowledge of it, and I don't believe I did. Mr. Biggs may have sent me a contract for the use of the tunnel to work the Red Jacket, offering \$1800, but I didn't pay any attention to it, because I was running the tunnel and I

didn't want Biggs or anyone else in there to interfere with my men at work in the tunnel, and if he made any such proposition, I paid no attention to it. There was no contract entered into. There may have been some proposition, but I don't remember it now. I think I have got his letters. I will produce them; there was no figures set, I don't want him there because he would be in my way.

I had a conversation with Mr. Bierke, and I told him the tunnel would pass through a corner of a piece of ground he owned—the South End—and I told him when I got through with the work, if he wanted to go in there he was welcome to it.

With regard to the value of the claims through which the tunnel runs, I don't know anything about it, any more than I ran the tunnel through there, and there is a little ledge in there, and that is all I know about it. I would not give \$3000 for all of them. I know that. I do not include the Goodman.

There has been some work done in the Red Jacket while I was running the tunnel, and they have injured my tunnel and piled their dirt on my track and stopped my men from work, and they have done the same thing in the Clinton. The track was not suitable to their cars and they have spread my track, and have made it less useful to me, and they have done all this against my consent and protest.

I don't think it was known that any ledge existed there before I developed it by my tunnel.

The tunnel strikes the Goodman line a little south of the center of the claim.

There was the appearance of a ledge right at the mouth of the tunnel on the Contact ground. It is not a ledge; it is a stringer and in some places it widens out some. I presume this tunnel had followed the ledge the same as I did. In some places we didn't see the ledge. Where the tunnel starts the ledge runs flat like that (illustrating) and I presume you noticed it at the mouth of the tunnel.

The tunnel can do the mining claim through which it passes no possible damage at all; on the contrary, it is a positive advantage to them. It shows a ledge through their claims which they knew nothing about, and never would have known anything about, and it gives them an opportunity to mine their claims.

Cross-Examination.

Mr. Douglass testified under cross-examination by Mr. Deal:

I don't know that I ever looked particularly over the surface of the Annie and Clinton mining claims for the purpose of ascertaining whether or not there was any outcrop of a vein on either of them. I have been over the surface a good deal and never saw any. I don't think there is any outcrop on the Annie. I have been over the ground a good deal and looked around, and never saw any ledge there.

I never made any agreement with Mr. Bierke that the owners of the South End claim may use that tunnel from its mouth to the South End and work it without compensation to be paid to me for the privilege of using the tunnel for that purpose. I told him this; if we found any ore there and he wanted to go in and work it, he could go in

there and put his men in there and take the ore out, and there was no agreement particularly about it.

Q. What I want to know of you is whether or not when this matter is ended, the owners of the South End shall have the right to work their claim through the tunnel without compensation?

A. Yes, if he wants to, but he must keep out of my way, as I said before, and not interfere with my men working there.

A. I want to read to you a portion of the contract introduced in evidence here—the contract that you made with the men for running this tunnel: “Said tunnel to be of the following dimensions, to-wit: four feet width at the bottom, three and a half feet at the top, and six feet in the clear, and to be run on the course of the vein.” I will ask you if in every contract that you made with men to run that tunnel, if such contracts called for the running of the tunnel on the course of the vein?

A. Yes, probably.

The ore saved at the mouth of the tunnel was separated from the waste; it was such ore as the men thought best to save and they separated it from the waste and saved it.

When I referred to work done on the Atlantic ground I meant the patented mining claim which is laid here upon the map as belonging to the Atlantic Consolidated Mining Company, as I understood it, and I speak of working upon that ground under the lease introduced in evidence here. At the time I was working there I was working as an equal partner with Andrew Charles. I was at the same time an equal owner with Andrew Charles in the Contact ground, I owning one-half and somebody else owning one-

half. I don't know whether I had quit working on the Atlantic before I started on the tunnel or not. I was doing the work on the Contact, and Charles never paid a dollar towards it, and he had no interest in the tunnel at all.

When the tunnel was being extended I asked Charles to measure the work for me, he being there and occupying my house. He was there to do the measuring only. He got no pay whatever, only what ore he got his son to hook out from the vein.

The total expense for the work done and material used in cleaning the old tunnel exceeded \$1000, but I cannot say how much until I look. Perhaps I had contracts to have the work done for 40 cents a foot, but I don't know. I don't know the largest price I paid for work done in cleaning and repairing the old tunnel. I furnished everything except the work under the contracts.

Biggs never paid a cent towards repairing or cleaning the old tunnel. I paid every expense for that alone.

Being subsequently recalled MR. DOUGLASS testified:

The young man who works in my office has since I testified gone over my books to ascertain the cost of repairing the tunnel in controversy. This report (showing) represents the expenditures in repairing the old tunnel. There is nothing in that report for new work done in the tunnel, and some of the items are rather under than over. If there is any difference at all, the cost of repairing the old part of the tunnel was rather over this itemized account.

When the work of running the tunnel was going on Andrew Charles did not represent me in any capacity whatever. He was there living in a house that I owned,

and I asked him when the men had gone a certain distance and they wanted their pay to see that it was correct, and that is all he had anything to do about it, just to measure the tunnel and see that it was correct, and the men would get their money for the distance they had run. He was not under my employ or under my pay at all. I understood he was secretly interested in the contract of extending the tunnel, but I knew nothing about it at the time. I have so understood since.

Cross-Examination.

Under cross-examination by Mr. Deal, Mr. Douglass testified as follows:

In this itemized statement there is a charge for recording location notice; that had nothing to do with the cost of repairing the old tunnel. There is a charge of \$20 for surveying I had done there. There is \$30 for the suit of Powers; I paid him \$233 and he took a notion he would get more money and he tried it on, but he didn't get it, and I had to pay the cost of suit, because he had nothing. There is the charge of laying air and drain pipe of \$296.20, and that was not for the old tunnel; \$137 for making upraise was an upraise in the old tunnel, and it was for an air connection, and the air pipe came all the way down this upraise. I presume those charges are correct, as my clerk knows as much about it as I do and I told him to put down nothing except for costs of repairing the old tunnel, and I presume all those charges are for material used in the old tunnel. There is charges for teams to mine, which was for teams to haul lumber and material and air pipe. I don't remember any man named Hendricks working in the old tunnel; Mullally worked in the old tunnel

and Brown. The other item of \$20 for surveying may have been in connection with the upraise. \$5 for repairing road was to put the road in condition to get material there. The charge for the bellows was to sharpen tools. The bellows are there yet, and the other parties use them a good deal, too. 43,000 old shingles was used on the buildings there. H. and R. stand for Hayes and Raphaelovich.

Petitioner's Exhibit No. 1 before Second Commission.

Team to mine	\$ 3 00
Tools	7 75
W. H. & Co., nails and candles	6 90
At times team to go to mine	8 50
Track iron	41 00
Nails and oil	9 00
W. H. & Co., nails	5 75
D. Crosby, nails	2 80
Track iron	9 68
Paid Hayes and Raphaelovich on contract	45 00
Nails	1 00
Paid H. & R. on contract	30 00
Horse and buggy	3 00
Candles	2 40
Files	50
Teams to mine	8 00
W. H. & Co., supplies	3 60
Charcoal	4 50
Lumber	163 69
Paid H. & R. balance on contract	105 00
Team to mine	2 00

Nails	\$	1 00
Teams to mine		2 00
Powder		2 50
Oil		1 00
Naighley & Bowman		62 60
Supplies		7 50
Candles		4 95
Candles		9 60
Nails		2 40
Livery		2 50
Hendrix, labor		32 00
Surveying		15 00
Neighley, labor		48 00
Lumber		142 55
.....		64 70
Mullaly and Brown on contract		202 00
Nails, supplies,		2 50
Livery		2 50
Livery		2 50
Supplies		5 50
Cummings on contract		115 50
Neighley, labor		75 00
W. H. & Co., supplies		13 98
Neighley, labor		21 00
Surveying		20 00
Supplies		1 75
Lumber		127 45
Supplies		1 60
Labor on road		5 00
Livery		2 50
Supplies		13 00

Supplies, bellows.....	\$ 10 00
Livery	2 50
Supplies	9 70
Supplies, nails	1 40
Supplies, lumber	28 10
Supplies, fuse and steel	6 60
Livery	2 50
Cummings, making upraise.....	157 00
Supplies, copper wire	1 90
Supplies W. H. & Co	35 10
Powers, timbering tunnel	255 00
Laying air and drain pipe	84 80
Air and drain pipe	296 20
Powers, cleaning tunnel	72 00
Case vs. Powers	30 60
Surveying	23 00
Recording location notice	2 50
House and putting up same	222 60
4300 old shingles	12 00
Old lumber	100 00
	<hr/>
	\$2837 15

Lumber and old iron of which no account was taken.

Yet there is a portion of the old tunnel that is much too low and will have to raise it from one to two feet before it will be in condition to work through conveniently.

[Endorsed]: J. M. Douglass et al. vs. James D. Byrnes et al. Statement of Expenses on old Tunnel. Petitioner's Exhibit No. 1.

Mr. Douglass' testimony given in the State Court in the case already referred to was also introduced in evidence:

I was one of the defendants in this action and the assignee of the lease from Muhlbeyer and the grantee of his deed, both introduced in evidence. Under the lease I furnished Andrew Charles a man or two to work in the upper workings of the Atlantic. Charles never worked in the lower workings at all; that has nothing to do with the lower workings at all; it is a different affair. Charles never worked in the lower tunnel since I got that ground. I never had possession of the lower tunnel until after Muhlbeyer made his deed to me and assigned the lease, and I never had possession of the Contact until after that time.

I did not take possession of the lower tunnel under the lease. I took possession of the Contact mine and of the lower tunnel under the purchase from Stanley. The lower tunnel had nothing to do with the lease of the Atlantic Consolidated. The lease was for the Atlantic Consolidated ground, and I took possession of the Contact mine and of the lower tunnel under a purchase from the owner.

The same man who owned the lease of the Atlantic ground owned also the Contact mine. I bought the Contact mine because the mouth of the lower tunnel was on the Contact ground.

Cross-Examination.

Mr. Douglass testified as follows under cross-examination by Mr. Huffaker:

The tunnel could not be used at all without being first repaired and put in working condition and I did that.

I make no claim whatever to the Atlantic ground; all I want is to pass my tunnel through it.

Under this conveyance of the Contact I bought for myself and for nobody else, and I went into possession of the Contact mine for myself and nobody else. I never went into possession of the Contact mine under the lease which has been introduced in evidence; the lease had nothing to do with the tunnel. The tunnel does not belong to the lease and has nothing to do with it. I bought the Atlantic claim and I leased the Atlantic Consolidated claim. I claim the Contact under the deed from Muhlbeier, which he got from Stanley, and which Stanley got from the locator, Brown, and nothing else.

Examination by Mr. Deal.

Q. Before you made the purchase from Muhlbeier of the Contact, you had the title examined? A. No, sir.

Q. Didn't you ascertain before you made the purchase that Brown had located the Contact claim?

A. Yes, I understood so.

Q. You had your attorney, Mr. Huffaker, do it?

A. I don't know whether he did or not. I suppose he did.

Q. You knew that Brown had conveyed to Stanley?

A. Yes, sir.

Q. You knew when Muhlbeier bought the Contact ground from Stanley that he also bought at the same time the lease which Stanley had from the Atlantic Company?

A. Yes, he got both at the same time.

When I got this lease I did not know who had run the lower tunnel. I did not take possession of the lower tunnel until after I got the lease. The lease came with the

conveyance. I think Mr. Huffaker drew all the papers at the same time.

MR. DOUGLASS testified as follows in rebuttal:

I don't remember the contract price for repairing the tunnel. It was more than three bits a foot; they were to clean the tunnel out.

Examination by Mr. Huffaker.

I may have told Mr. Byrnes in my office that I held the Atlantic Consolidated ground under the lease, but the lease had no reference to the Contact ground, nor of the tunnel.

Examination by Mr. Deal.

It was Charles' representations that induced me to buy this Contact ground and to take that lease of the Atlantic Consolidated Mining Company's property. I took the lease more for his benefit than for mine. I did not want it myself; it was no use to me. At the time I took the lease and bought the Contact I had an idea of extending the tunnel.

Q. You knew that the tunnel and the Atlantic Consolidated ground were both owned by the same parties?

A. I knew the Contact was not owned by them.

Q. You knew that Stanley had a lease there, and that Stanley and Millievich had a lease, and that Andrew Charles was a secret partner in the lease—that Millievich had the lease for Andrew Charles?

A. Yes, I think so. I say, I think so. I think Charles told me he was a secret partner with Stanley in the lease, and that Millievich held the title for him.

I wrote to Green about the tunnel as I supposed when I

wrote to him that the tunnel was on the Atlantic ground; I did not know where the tunnel was. I did not write to him after I bought the Contact ground. I did not write to Green as an officer of the Atlantic Consolidated Mining Company looking to him to get the right of way for the tunnel. I had not seen the tunnel at the time. I wrote to him about a tunnel on the Atlantic ground; but I afterwards found that the tunnel I wrote to him about was not on the Atlantic ground. I know now the tunnel I wrote to Green about was this tunnel in dispute, but I didn't know where the tunnel was then, and the only object I had in paying a half interest was for the privilege of going through there. I understood from Mr. Green that he was an officer of the Company and that he was an owner in that ground.

Examination by Mr. Huffaker.

After writing to Green I discovered the tunnel I wanted was not on the Atlantic ground, but was on ground owned by other parties. The reason I purchased the Contact ground was to extend that tunnel to the Goodman mine.

By MR. DEAL:

I took the deed for the Contact mine for my own benefit. It was for the purpose of getting possession of the tunnel that started in the Contact ground.

Q. C. J. Millievich, who held a half interest in the Contact claim, held that half interest for the benefit of Andrew Charles, also?

A. Yes, I think so; I say I think so. Charles had a half interest in the Contact mine under cover; the way he generally does his business—under cover.

W. H. STANLEY, called upon the part of the defendants, testified as follows:

I am the lessee named in the lease introduced in evidence from the Atlantic Consolidated Mining Company to W. H. Stanley. Andrew Charles and I owned equal interests in the lease. I think Joseph M. Douglass, the petitioner in this suit, knew of the fact that Andrew Charles had an equal interest with me in that lease prior to the time I assigned that lease to Frank A. Muhlbeyer. I informed him of the fact before the assignment was made. Andrew Charles was an equal partner with me in that lease at the time I made the assignment of it to Frank A. Muhlbeyer. I informed Mr. Douglass of that fact before I made the assignment. Mr. Huffaker drew all the papers with regard to that assignment. When the papers were drawn Andrew Charles was an equal partner with me. At the time of the assignment of this lease to Muhlbeyer I informed Mr. Huffaker that I only owned one-half of that lease, and that Andrew Charles owned the other half. I informed him of the same fact at the time of the conveyance of the Contact. I expressed a doubt of my right to convey the Contact claim at all, and Mr. Huffaker said I could convey it, and that he would stand between me and harm in that respect and so I conveyed.

The ground that I bought from Brown was originally known as the Cadiz, and it was originally claimed by the Atlantic Consolidated Mining Company, and Brown jumped the ground. Then, as I had a lease of the property, and wished to work it through this tunnel, I purchased the Contact ground from Brown, so as to avoid all

trouble, as I intended to work under my lease through this lower tunnel, the mouth of which is located on the Contact ground. I bought the Contact ground in order to enjoy the benefit of my lease from the Atlantic Consolidated Mining Company. I thought it was necessary to have the lower tunnel.

The conveyance of the Contact and the assignment of the lease by me to Muhlbeier was all one and the same transaction. It was drawn at the same time and upon the same consideration, and all between the same parties to the transaction. Muhlbeier was there at the time; he heard the conversation with regard to the ownership of the claim, and he heard the doubts I expressed with regard to my right to convey the Contact, being present. Muhlbeier represented to me that he wished to work the Atlantic ground under the lease I held, and under the same conditions, and I told him what the conditions were and that the company was anxious to prosecute the work, and he bought the assignment from me with that understanding.

I cannot say that I claimed any interest in the Contact adversely to the Atlantic Consolidated Mining Company, because in making the conveyance I expressed a doubt that I had any right to make it.

Cross-Examination.

Under cross-examination by Mr. Huffaker, Mr. Stanley testified as follows:

Q. When these transfers were made, did you not ask me if you could assign that lease under the conditions expressed in the lease?

A. I expressed a doubt whether I had the right to convey all those documents, as a whole, as I understood it.

Q. And when I read that lease over, I told you you could assign that lease if you wished to, and that no one could take advantage of the lease, except that the Atlantic Consolidated Mining Company could repudiate it?

A. Yes, you said I had the right to assign it.

By MR. DEAL:

Q. Didn't you ask Mr. Huffaker whether you had the right to make a deed of the Contact mining claim to Muhl-beyer?

A. I believe I asked if I had the right to transfer it as a whole.

By MR. HUFFAKER:

Q. There was nothing said about tenancy or anything of that kind?

A. That had reference to the whole and one transaction that I expressed a doubt about.

The following testimony given by Mr. Stanley in the State Court in the case hitherto referred to was introduced in evidence:

I am the lessee named in the lease which has been introduced in evidence in this case. Under that lease I took possession of the ground and of the tunnels—there were three tunnels leased with the ground. I got the Atlantic and the Cadiz ground. That was in the spring of 1890. The Atlantic Consolidated Mining Company called a meeting and they authorized the trustees to give me a lease of the property, and they executed and delivered to me a lease under authority of the board of trustees, and I

took possession of that property under that, under the lease that you introduced in evidence. I assigned it afterwards to Frank A. Muhlbeier. I took possession of the lower tunnel under the lease which I had of the Atlantic ground and its appurtenances. The first thing I did after getting the lease, I took possession of the lower tunnel—the tunnel in controversy here, as I expected to do the greatest part of my work through that tunnel. I went into the tunnel several hundred feet and went to where it was badly caved, and I crawled over the cave easily, and got into the patented ground of the Atlantic Company; I got well into the patented ground. This long tunnel passed entirely through the Cadiz, and went into the patented ground, but how far I could not tell. Then there was a shaft about 300 feet in from the mouth of the tunnel that was sunk from a cross drift a short distance from the tunnel, and I went down that shaft and found that was badly caved also. I removed some ladders that were down that shaft; that was in fact the first work I did under the lease. After that I did some work on two other tunnels on the property.

When I got the lease which has been introduced in evidence, there was a mine called the Cadiz, which was part of the ground leased to me by the Atlantic Consolidated Mining Company. They gave me a map of the property leased to me, and this map included the Cadiz ground as part of the lease.

Q. When you took this lease from the Company, did you ascertain whether anybody was claiming this ground in front of the tunnel and where the mouth of the tunnel is?

A. Yes, when I went there to take possession and work under my lease, I thought I would have trouble with Brown, and to remove him, I simply bought him out for myself and for Mr. Millievich, a merchant of Virginia City. I don't know who he represented.

Then Muhlbeier came to me and represented to me he wanted to work that ground under that lease. I delivered possession to Muhlbeier according to the terms of the assignment. I went before Mr. Huffaker, and I expressed some doubt to him whether I could assign that lease, and he assured me that I could, and I accordingly made the assignment to Muhlbeier. I put Muhlbeier into possession of the very same property. He said he wanted to work it and I said he should pay the royalty and conform to the terms of the lease, and he stepped into my shoes so far as that lease was concerned.

After Douglass got the assignment and the conveyance from Muhlbeier he operated the mine and extracted ore and extended the lower tunnel beyond the point where I penetrated it.

At the time I got the lease the lower tunnel cut a lode or vein of quartz in the Atlantic ground. I am a miner and I know a lode or vein of quartz bearing gold and silver when I see it. I know there was a vein shown and exposed by that tunnel, in the Atlantic Consolidated ground at the time I went into the tunnel under the lease. Andrew Charles had a lease of that property before, and he went in the tunnel with me and showed me where he had put timbers in, and where ore had been taken out and that is exactly where I expected to do my work under the lease from the company.

No one attempted to do any work there outside of myself until after I assigned the lease.

Upon being recalled, MR. STANLEY testified as follows:

The tunnel when I went there under the lease had been driven 200 feet in hard blasting rock and for that distance it had not been caved any. Beyond that it was caved slightly. The most of the caved ground was about 300 feet in, and then I could go about 50 feet in the caved ground. There was no trouble in reaching the Atlantic ground through that tunnel; I could walk in readily a distance of 300 feet. For a distance of 300 feet the cost of repairing the tunnel would be to lay down the track, and that would be about \$100. If there had been no tunnel there it would have cost seven dollars a foot to run that tunnel, and at the time it was run it cost more than that, as everything was higher.

Cross-Examination.

On cross-examination MR. STANLEY testified:

I think the cave was near the Atlantic line—passed the line, in the Atlantic ground. To work the Atlantic ground you would have to remove the cave. You could work it at the edge of the cave as the lode dipped easterly. No mining man could have gone in that tunnel for the purpose of working the Atlantic ground without first repairing the tunnel.

JAMES D. BYRNES, called upon the part of the defendants, being first duly sworn, testified as follows:

I am one of the plaintiffs in this action. I went with

the sheriff of Lyon county upon the Atlantic Consolidated Mining Company's ground to take possession in February, 1893, before I commenced suit in the District Court, Storey county, against J. M. Douglass. At that time I had the deed from the sheriff of the property. The sheriff of Lyon county put me in possession of the ground upon the surface. I went to the upper and to the lower tunnel. I was refused possession of the lower tunnel by Douglass' men. After the men refused to let me take possession of the lower tunnel, I came to Virginia City to see Douglass, and he refused my right to go into the tunnel, and he also showed me a lease that he had from Stanley, and he said he went into possession of that tunnel under the lease. He had his nephew bring out the lease, and he showed it to me. I informed him I was the owner of that property at that time.

I went up on the mine and the sheriff put me in possession. I first went to the upper tunnel and that tunnel was locked, and then I came to the lower tunnel, and the men there said I had no right to go there, and then I came to Virginia City and went to see Douglass, and I went to his office and spoke to him, and I told him that I was the owner of the Atlantic tunnel; I told him that myself and James J. Green, deceased, were the owners of the tunnel, and I spoke to him about the lease under which Stanley went to work in the tunnel, and he got his nephew to go in and bring out the lease, and he showed me the lease, and then we had a couple of words, and he said he would be damned if I had any rights there, and I said I would get it if there was any law left, and that was about all there was about it. He said I had no rights there. That was the cause of this suit.

Cross-Examination.

MR. BYRNES testified as follows, under cross-examination by Mr. Huffaker:

Q. Douglass did not say that he went into possession of that tunnel under that lease, did he?

A. That was a portion of the talk——

Q. You do not answer my question. Did Douglass tell you that he went into possession of that tunnel under that lease?

A. He said he had a lease of the tunnel under Stanley, and he showed me the lease.

Q. But he did not say that he went into possession under the lease?

A. Yes, I think he did; I could not repeat the words he used, but it was something to that effect.

Q. Didn't the sheriff tell you when you asked him to give you possession of the lower tunnel, that he did not sell that tunnel? A. Yes, he made that remark.

Q. And the sheriff did not go to the lower tunnel with you? A. No, he went to the upper tunnel with me.

Examination by Mr. Deal.

I paid about \$5000 or \$7000 to make the tunnel, and I paid Judge Blackburn as watchman of the property, including the tunnel, for two years, and I paid a judgment of over \$700 that he recovered in this court from the company. I was a stockholder of the company. Blackburn got about \$800 for watching the property, and the title that I bought and under which the sheriff of Lyon county put me in possession was for the sale of the property under that judgment. I was a stockholder and officer

of the company at the time, and as such officer I know the facts to which I have testified.

Under Examination by Mr. Huffaker.

I don't know when this tunnel was started, and I don't know how far it had been run before I got it, but it had been run some distance by somebody before I expended any money on it prior to my time.

JAMES D. BYRNES testified as follows in rebuttal:

There was no action on the part of the board of directors of the Atlantic Consolidated Mining Company indicating that they ever intended to abandon that tunnel or any part of their property. I know that property to-day, and that tunnel is the principal thing that makes it valuable. By means of that tunnel we can reach and work the lower workings of our mine, and that is what we expect to do; I came here with the intention and for the purpose of having work done there through the tunnel. The country there rises steep; I know of no way that we can work that mine profitably except through the tunnel.

J. D. BLACKBURN testified upon the part of the plaintiff: I was the plaintiff in the suit of J. D. Blackburn against the Atlantic Consolidated Mining Company, which was tried in the district court of the State of Nevada, first judicial district, Storey county, and recovered judgment for the amount claimed. Between October 28, 1887, and September 1st, 1890, I performed certain services for the Atlantic Consolidated Mining Company, as watchman, taking care of their property. The company had run the lower tunnel. Bob Buzan worked in it in 1875. When I

saw Buzan working there the tunnel had been run a distance of over three hundred feet, and he run it along a distance until he cut the ledge. It was the same named company that I was watchman for that run the tunnel, but different men became interested in it. The parties I worked for as watchman became possessed of the lower tunnel as successors in interest of the parties who run the tunnel. When I went there as watchman the first day of February, 1887, I took possession of the lower tunnel and their other property, until I commenced suit against them for my wages the 2d day of September, 1890. I worked for them as foreman and superintendent at first and worked in that capacity until they closed the mine, and then I was left in charge as watchman. I remained as watchman until September 2d, 1890.

Cross-Examination.

On cross-examination, Mr. Blackburn testified: I didn't do any work as watchman. It was some years prior to 1890 that work had been done on the Cadiz ground. I think when Brown located the Cadiz ground in 1890, that it was vacant ground subject to relocation by reason of the fact that no work had been done for several years. The tunnel was a good tunnel for about 430 feet, in 1890. I measured it to the point where it was caved at that time with Brown. The tunnel was run about 300 feet when I went to Silver City in 1872. I understood it had been run by the Atlantic company. One of the original locators of the ground told me the company run it. It was about 1882 when the corporation last done any work on the tunnel.

Redirect Examination.

On redirect examination witness testified: The company during that time was doing other work through other tunnels. I helped to run them myself. They spent lots of money. Uhl, their superintendent, worked the Atlantic Con. claim through other tunnels, and he did some work in the lower tunnel too. I never knew anybody except the Atlantic Consolidated Mining Company ever claiming the lower tunnel, until Mr. Douglass claimed it in this suit. It was J. M. McGinnis and R. C. Buzan who worked in that lower tunnel.

THEODORE VINCENT was called by plaintiff and testified as follows: I have resided in Silver City for twenty years and have been engaged in mining a portion of that time in the vicinity of the Atlantic Consolidated Mining Company's claim in Devil's Gate and Chinatown Mining District, and I know the tunnel which has been testified to by J. M. Douglass and other witnesses. I understand what is in dispute in this case. I never was in the tunnel twenty feet in all my life. The tunnel was run a certain distance when I came there. I have seen people working there in that tunnel apparently taking out rock and doing mining work. I saw John Yule, the superintendent, and a man named McGinnis working there. I saw Yule there at work in 1878, and again later on in 1886 or 1887. I got acquainted with him in 1878. I was at work above there taking out rock and Yule told me he was running the tunnel for the Atlantic Consolidated Mining Company. Mr. Vincent testified under cross-examination:

The last work I saw done in that lower tunnel was in 1880.

E. T. POWERS was called by plaintiff and testified as follows: I reside in Silver City. Have been mining for five or six years. I know the Atlantic Consolidated Mining Company's tunnel, and have passed there several times within the last fifteen years. I was in that tunnel when Douglass had men in there laying the track. I was in the tunnel two or three hundred feet before they laid the track. I was there when a man named Duncan had a contract to clean the tunnel out, and he said he had 30 cents a foot to clean the tunnel out and put the track in. I went in the tunnel about 250 feet, I think. The men had started to put the track on the outside of the tunnel, and they put a bridge across the creek for that purpose. I have worked ten months in that tunnel since. Mr. Douglass told me it cost four dollars a foot to run the tunnel in solid ground. This man had 30 cents a foot to lay the track, and it couldn't cost much money to extend the track to where the tunnel was pushed ahead, or where it cut ore, maybe not a hundred dollars. I include the laying of the track. They did not cut the tunnel any deeper to lay the track and they did not dig a drain; they merely raised the track up. I think that for two or three hundred feet of the tunnel the tunnel could be repaired and the track laid for \$100. I think the highest price it cost them to clean out the tunnel and lay the track was \$2 a foot, where they done some timbering, and they struck an open space in the tunnel of about one hundred feet, too.

Cross-Examination.

On cross-examination, witness testified: The first 250 feet I speak of is from the mouth of the tunnel. That brought the end to about the line of the Atlantic ground, I didn't go beyond that point in. I don't know how the tunnel was beyond that point in.

Redirect Examination.

On redirect examination, witness testified:

I think where the cave was is where the ledge of the Atlantic is. I could have crawled over the first cave, but I didn't do it, but I know there was a ledge there, as I could see quartz.

J. F. ANGELL was called by defendants and testified as follows:

I have lived thirty-three years in Silver City. I know the tunnel in controversy and the ground called the Contact mine, and have known it since the fall of 1860 or 1861. I don't know who started the tunnel or when it was started. I know a man named McGinnis and Robert Buzan commenced work there in 1865, and run a tunnel there for water. They worked there in 1865 and 1866 to my knowledge. Buzan left there in 1872 or 1873, and McGinnis left there about twelve years ago. The last work I saw done there I think was when Matt. Canavan in 1887 had a fellow named Akey work awhile there, and Canavan went to secure the tunnel and put timbers in there. I think Yule came there in 1878 to work. He worked in the tunnel and worked in the shaft that was sunk in 1861, and he got hurt and went away and came back in 1878, I think.

The shaft stood up the ravine three or four hundred feet from the mouth of the tunnel. It was situated on the Atlantic ground. They got water in that shaft in 1871, and quit. I don't think Yule done anything in the old tunnel in 1887. Yule came up there about that time and stopped around there a week or ten days and then he went below and came back and went to work running a new tunnel. He said when he came back that his business below was to consult the company about its being better to run a new tunnel than to clean out the old one, and when he came back he went to work running a new tunnel and did not work in the old tunnel. I never saw any work done in the old tunnel after the time Matt. Canavan put men to work in there to secure the ground in 1877. They secured a point of ground about 200 feet in from the mouth of the tunnel. The tunnel was in a very bad condition. Canavan said it was a wonder the fellow didn't get buried up.

Cross-Examination.

On cross-examination Mr. Angell testified: Canavan and I went into this water tunnel where Naighlaigh was at work. I suppose Canavan had that work done for the Atlantic Consolidated Mining Company to prevent the tunnel from caving. I knew from what Canavan told me that he had the work done for the company and that he was having the work done to prevent the tunnel from caving. Yule did not tell me the company was going to abandon the old tunnel. The men I knew at work in the tunnel in 1865 and 1866, were J. M. McGinnis and R. C. Buzan. I heard they sold what was known at that time as the Pacific lode. I don't know who to.

J. B. McJILTON, called by defendants testified as follows: I have resided at Silver City off and on since 1875. I know the tunnel in controversy on the Contact mining ground, and have known it since 1876. I was acquainted with Charles Aitken that worked there in 1876. I don't know when it was run or how far. Aitken worked there in 1876, and he must have been there in 1878, and John Yule must have been there in 1878, and the last work that was done there was in 1881, and the next work I know being done there was in 1887. I don't know how long they worked in the lower tunnel, but they left the lower tunnel and went above on the Atlantic Consolidated ground and they started a tunnel just about the middle of the claim, and they run the tunnel in about 400 feet, I should judge. They were working there in 1887 and 1888. I don't know that they worked much in 1888. In 1889 and 1890, and I believe a big portion of 1891, I believe that place was vacant, and there was nobody working there. I was working on the ground above during that time myself, and there was nobody working below there. I understood the lower tunnel was caved in 1890 and 1891, and I have been quite a distance on the cave; it was not caved to any extent, and it would be cheaper to clean it out than to run a new tunnel. As far as I saw it, it would be cheaper.

Cross-Examination.

On cross-examination, Mr. McJilton testified: I understood when Aitken was working there that he was working for the Atlantic Consolidated Company, a California corporation. When Yule worked there he was working

for the same company as superintendent. I have never heard of any one claiming that lower tunnel except the Atlantic Consolidated Mining Company until Mr. Douglass claimed it in this suit. He is claiming a tunnel that was already run more than three or four hundred feet to my knowledge. Part of the way it is in solid rock. During the time that I said nobody was doing any work in that tunnel I knew that Judge Blackburn was there. I don't mean to say by abandoned that the company had thrown up its rights to any part of their property. All the persons I saw working there, I believe they were working for the corporation. On redirect examination: The work I saw Yule doing was in the upper tunnel on the Atlantic patented claim.

Recross-Examination.

On recross-examination: I would not say that Yule, as superintendent of the Atlantic Consolidated Mining Company, did not do any work for the company in the lower tunnel. I simply say I don't know whether he did or not and that he did most of his work through the new tunnel. He might have done some work through the lower tunnel.

On being recalled by defendant, witness testified as follows: I have known the lower tunnel since 1876. I helped to take the timbers out of the lower tunnel late in the fall of 1889. Judge Blackburn had charge of the Atlantic Consolidated mine at that time. I understood he had charge of it for the Atlantic Consolidated Mining Company. I took the timbers out at his suggestion. I did not take the timbers out of the tunnel; it was out of

the shaft I took the timbers out of; the timbers extended from the top to the bottom of the shaft. The shaft is situated on the Cadiz ground in that ravine close to the east boundary of the Atlantic Company's ground. It is just above the lower tunnel. I think there is a connection made between the shaft and the lower tunnel. I don't know who took the track and timbers out of the lower tunnel.

J. M. DOUGLASS testified as follows before the commissioners, being called by defendants: I am the petitioner in this proceeding. I have a contract to construct the tunnel right in question in this matter of the size of the right of way described in my petition, $7\frac{1}{2}$ feet square, but it was not constructed the same size as called for. I made the contract or agreement to construct the tunnel $7\frac{1}{2}$ feet square. It is in writing. (Contract produced.) This is the only contract I have that I know of; the others are all destroyed. The contracts were not completed, but I accepted them. The contract is offered in evidence by Mr. Deal for the purpose of showing the use that is to be made of the tunnel by the petitioner, the purpose for which it is constructed and also the size of the tunnel. The contract provides that "the said first party hereby agrees with and binds himself unto said second party, to dig, excavate, construct and extend said tunnel the distance of five hundred feet from the present face, said extended tunnel to be of the following dimensions, to-wit: Four feet in width at the bottom, three and one-half feet in width at the top, and six feet in the clear in height, and to be run on the course of the vein, and as near thereto as practicable." That was the size of the tunnel to be constructed,

I suppose. The face of the tunnel was not up to the Goodman ground when this contract was made. The contract is dated July 12, 1893. I seldom go there and don't know where the face of the tunnel was when it was commenced. Powers commenced at some point where other persons that I had contracted with had left off. I made this contract with Powers. I had contracts with other persons who extended the tunnel, and I presume the contracts are all for the same dimensions of tunnel as this contract calls for. If I want to, I will construct a tunnel there $7\frac{1}{2}$ feet square for a right of way. As to the size of the tunnel I intend to construct I place that matter entirely upon my own desires and inclinations.

The following question was asked witness: "Q. In case you extend that tunnel into and through the Goodman ground and find a body of ore, have you any intention of increasing the size of the tunnel? A. That is something I can't tell you; if I do, it is my business, and not yours." I will do whatever I think is to my interest to do. I am not running that tunnel for the benefit of anybody else, unless you want to pay for it, or a part of it. "Q. Have you any intention, or have you ever had any purpose of permitting any of the defendants in this action to make use of any part of the tunnel from its mouth to the Goodman ground? A. If they pay for it; I say, if they pay for it." I have no desire or any intention whatever to permit any of the defendants to use any part of this tunnel, even through their own ground, unless they pay for it—unless they pay me for the use of it. It is my intention to charge them a very moderate price if they desire to use the tunnel. I do not propose that they shall fix the terms unless the same is agreeable to me. That

tunnel has cost me over eight thousand dollars. I regard that tunnel from its mouth to the Goodman and through the Goodman as my own private property, without any right of anybody in it, and I propose to charge what is right that the defendants shall pay for the use of the tunnel, and no more. So far as I am concerned and the Goodman Mining Company, my purpose in securing a right of way by these proceedings is to have the tunnel for own use and benefit. No one else can use it without my consent. They can use it by paying me a just sum. I don't want any more and I would not have it from any of them.

Second. The decision of said circuit court confirming said report and denying said motion for new trial was erroneous in that the commissioners in their report found and decided that H. C. Biggs and Maggie Lee McMillan are the owners each of an undivided one-fourth interest in the Contact claim and mine and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary line of the Contact claim, and said commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation whatever for said tunnel through the Contact claim, or for said right of way through said Contact claim.

Third. The decision of said circuit court confirming said report and denying said motion for a new trial is erroneous in that the commissioners in their report decided and found that H. C. Biggs and Maggie Lee McMillan are the owners of the Annie and Clinton mines, and that The Red Jacket Consolidated Mining Company is the owner of the Red Jacket mine, and that the petitioners are en-

titled to the right of way for the tunnel mentioned in the amended petition through each of said mines, and no compensation whatever is awarded the said owners of said mining claims or either of them for said right of way.

Fourth. The said decision of said circuit court in confirming said report and denying said motion for new trial is erroneous in that the completed tunnel through said Contact claim from the mouth of said tunnel to the western boundary line of said Contact mine, a distance of 299 feet, was worth at the very least \$2990 and it would have cost the plaintiff at least \$2990 to construct such a tunnel to the west line of said Contact claim, and yet said commissioners did not award any compensation to the owners of said tunnel for said tunnel, or the right of way through said Contact claim.

Under the specifications, defendants refer to the testimony and evidence set forth under the first specification of error, and further show that upon the hearing the following testimony was given by witnesses who were duly sworn:

R. LAMB testified that he was a miner, and had long experience as a miner, that it would cost \$3000 to run the first 250 feet of the tunnel, and \$1600 to run the rest of the tunnel.

E. T. POWERS testified that he was a miner of long experience and that it would cost \$3500 to run the first 350 feet of the tunnel, and \$1500 to run the rest of the tunnel.

Fifth. The said decision of said circuit court in confirming said report and denying said motion for a new trial is erroneous in that the tunnel through said Atlantic

Consolidated mine and into the Annie ground already constructed by the owners of the Atlantic Consolidated mining claim and their predecessors in interest and grantors, the same being 394 feet in length, was worth \$2000 and it would have cost plaintiff \$2000 to construct the same; yet the commissioners awarded James D. Byrnes and Edward Mulville \$1021.95.

Under this specification defendants refer to the testimony hereinbefore set forth, and to the report of said commissioners.

Sixth. The said decision of the circuit court in confirming said report and denying said motion for new trial is erroneous in that no compensation is awarded by the commissioners for the damage sustained by the defendants, H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company, by the wrongful acts of plaintiff, J. M. Douglass, in running the tunnel through the ledge in the right of way condemned, through the Annie, Clinton and Red Jacket mines, and in taking out the ore excavated in running the tunnel, and throwing it away instead of saving it for the owners thereof.

The evidence showed that immediately after these proceedings commenced, plaintiff, J. M. Douglass, under an order of court made in the case under the statute took possession of the right of way described in the amended petition, and run a tunnel upon the ledge, through the Annie, Clinton and Red Jacket claims, and threw pay ore away over the dump, so that by his acts it was lost to the owners of said claims. Under this specification of error defendants state that the following testimony was given at the hearing:

E. T. POWERS testified that after the tunnel through the Contact, Atlantic and part of the Annie claim had been repaired he took a contract from J. M. Douglass to extend the tunnel 500 feet. "My contract provided that the tunnel should be six feet in the clear, three and a half feet wide at the top and four feet wide at the bottom. J. M. Douglass instructed me to follow the vein and the contract called for it. I followed the vein the whole 500 feet. I found ore there, and I had a verbal contract with Douglass to save the ore, and I did save part of it, and there was a storm, and no dump to put the ore on, and I put ore in the creek. I told Douglass after we struck a big bunch of ore in the Red Jacket ground to put a dump in there and we would save the ore, but he did not do it, and so we dumped the ore in the creek, right in the channel and a flood of water washed it away. The ore was gold bearing ore principally. Douglass said, while under the influence of liquor when I told him there was ore there, to let it go to hell. I made a special trip in a buggy from Silver City to Virginia to tell Douglass about the ore and this was the reply he made to me. The ore we dumped in the creek was as good, if not better than that saved, and that saved was \$20 to \$25 rock. I think it would mill that. It would cost \$6 a ton to mill it, and from 50 cents to \$1 per ton to haul it to the mill. The vein in the Red Jacket would average 18 inches in width. I think that ore ought to mill \$35 to \$40 per ton, and we had assays made that went up into the hundreds. The whole of the vein, 7 feet by 1½ feet, was taken out, and that would make 84 tons from the Red Jacket mine. The ore taken out and thrown away was better than that immediately above the tunnel.

The Red Jacket mine is worth \$2,500 less than it was before the ore was taken out. The ore taken out and thrown over the dump in running through the Clinton ground would average ten inches in width, and some of it was worth \$60 per ton. The ore was thrown in the creek and was finally washed away.

W. S. CUMMINGS testified that he is a miner and worked 24 shifts under Powers, who had the contract from Douglass to run the tunnel on the right of way. The orders were to run the tunnel in the vein, and it was so run. There was ore taken out in running the tunnel, and dumped with the waste altogether. There was no means provided to save the ore.

It was admitted upon the hearing by counsel for all the parties to the suit, that the tunnel is 648½ feet in length to the point where petitioner began new work in extending the tunnel.

G. W. DEBUS testified that the value of the ore taken out of this tunnel in the Annie ground was worth about \$35 or \$40 per ton; that from the Red Jacket \$60 to \$90 a ton. The assays from the ore taken from the Clinton ground ran from \$130 to \$289 a ton. I took out forty tons of ore from the ledge from the top of the tunnel up. It paid us \$1254.

CHARLES POLLOCK testified that he is a miner, that he worked in extending the tunnel under Powers for J. M. Douglass about a month. The tunnel ran upon a vein of gold and silver bearing quartz. There was pay ore in the ledge. I worked in the Clinton ground. The ore taken

out was thrown away. The ore and waste was all broken down together and thrown away.

GEORGE ROACH testified that he had worked about a month under Powers in running the tunnel. The ledge was taken out and dumped with the waste. It was pay ore.

ALBERT S. PURDY testified that he was in the tunnel when it was being run through the Clinton claim. Ore was taken out in running the tunnel on the right of way and dumped in the creek. Ore was taken out of the same vein by the owners above the tunnel from the Red Jacket, Annie and Clinton claims. There was 63 tons of \$22.50 rock and 40 tons of \$31.25, and the \$60 rock in free gold was 13 tons. We began right at the tunnel in the Clinton ground. All that ore and all of the rock taken in running the tunnel was all dumped together as waste.

On the part of plaintiff, W. H. NAILEIGH testified that he had no instructions to dump ore and waste together in the bottom of the creek. That no instructions were given to save ore, and did not do it. The ledge in the tunnel run from five to six and seven inches in width, and there is a seam of pay ore running through the vein. I measured it at different points in the Red Jacket and measured the largest place in the Clinton ground on the side of the tunnel, and it was about one foot wide, and these were places where there was only a little ribbon of quartz and stringers that ran through the vein formation. The width of the ore to save and mill in the Clinton ran from two to five and six inches, and then it would pinch

down to nothing that could be saved, and then it would widen out again. It was not continuous wide enough to save the entire distance, but could be saved in places. From the South End claim the ore started in the Clinton and run a distance of 40 or 90 feet, where the ore went along. There is not a solid, continuous ore body followed by the tunnel. From the place where I commenced to work taking all the ore that could be saved at a profit where it was wide enough, I would say it would average 4 inches in all. I took out ore immediately above and below the tunnel that paid \$30 a ton. I took ore from the Clinton claim immediately above the tunnel that paid \$90 per ton. No human being can tell the value of the ore taken out by the tunnel excavation in those claims, by reason of the fact that the ore was taken out and carried out by the workmen with the waste, and all dumped together in the creek. I do not consider that there was any ore taken out of the Annie claim and thrown away which would pay a dollar a day to save it. I would run a tunnel similar to the one that was already run through similar ground 648½ feet at \$7 per foot through the hard blasting ground, and the balance after vein matter was struck for \$4 per foot.

J. D. BLACKBURN, F. S. LACROUTS, J. F. ANGELL and E. D. BOYLE each testified on the part of the plaintiff that he had examined the vein in the tunnel run through the Annie, Red Jacket and Clinton claims, after the tunnel had been run through those claims, for the purpose of determining whether the vein contained ore of sufficient value or in sufficient quantity to pay to mine it, and testified that in his opinion the ore would not pay to extract.

W. H. NAILEIGH, a witness called on the part of petitioner, having been first duly sworn, testified as follows:

My occupation is mining, and have been engaged at various kinds of mining since 1854 and 1855. I have mined in Silver City since 1861, and I am familiar with the ore deposits and ledges in that district. I know the Contact-Goodman tunnel. It commences on the Contact ground and runs through different claims to the Goodman mine. The old tunnel had been excavated some distance beyond the Contact ground. I went with Andrew Charles in the tunnel and climbed in over some caves, but at the time I went to work in the tunnel it had been cleaned and repaired and the track was laid to the Annie ground, and when I commenced work extending the tunnel it was already in the Annie ground. I started the work of extending the tunnel with John C. Charles under a contract with Mr. Douglass. E. T. Powers got the contract and Andrew Charles and his son John Charles and myself were interested in it. We all shared the money for the first 117 feet run.

In running through the Annie ground we followed the the vein according to the contract and took out vein matter and quartz; there was a seam of quartz on the hanging wall and Mr. Charles said it required to be saved, and we got out about half a carload of rock and dumped it on the dump. Charles and Douglass were partners, and he said Douglass wanted his saved and we saved it. Then the seam pinched so we couldn't save it and we didn't save any more until we got to the Red Jacket where the vein got wider, and where it could be saved; the ore showed black sulphurets there, and Mr. Charles said he would like to

have that saved; he said Douglass wanted it saved. I did not horn any, but I examined it with the eye, and we concluded to save the ore from that point, and we allowed John Charles to gouge in the streak as far in as he could and take it out and dump it on the dump. We worked that way until the ore pinched and got mixed again, and until Charles thought it would not pay to save any longer, and we didn't save any more. In the Clinton ground we followed the vein of quartz and clay all the way; in some places it would be mixed up with little ribbons of quartz and other times there was two or three inches of quartz, and we did not undertake to save any of it there. We had a contract to run the tunnel at so much a foot, and it took a little extra time to save the rock, and Powers went and saw Douglass, and they had some kind of agreement or understanding. Powers told me and the others when he came back that Douglass had agreed to pay monthly, or save fifty per cent, if necessary, and if any ore did come in he was to save the ore. At any rate we got no more orders to save any ore from Charles. At that time Charles was Douglass' agent, and he received the work and made the measurements, and we done what he said about saving the ore, and all that. Whenever he thought the ore was in sufficient quantity to save he told us to save it; where it was too small it took too much time. I understood Charles was an owner in the Annie, and he took charge of the ore we got there, but we got very little there. The ore from the Red Jacket was dumped at the mouth of the tunnel on the side of the track, and most of it is there yet. We did not receive any orders from either Douglass or Charles to dump the ore and the waste together in the bottom of the creek. When we had no instructions to save

the ore we did not save it. Charles was there and his son was there, and his son seemed to represent him, as he would tell us "father said so and so," and he would say "this ore is not worth saving," and finally there was no ore to save. Of course, it was not to our advantage to save the ore, and we did not save it only when we were told to save it.

The ledge through the tunnel is vein matter from five to six and seven feet in width, and there is a seam of pay ore running through the vein. I measured it at different points in the Red Jacket, and measured the largest place in the Clinton ground on the side of the tunnel and it was about one foot wide, and there was places where there was only a little ribbon of quartz and stringers that run through the vein formation. In the Clinton the ore seemed to run from two to four or five inches, and there was quartz on either side of that pay seam that was mixed with Clay, but the width of ore to save and mill in the Clinton run from two to five and six inches, and maybe in some places it would be as wide as eight inches, and then it would pinch down to nothing that could be saved. It was not continuous wide enough to save, but could be saved in places, probably. In places it was wide enough to save if it was rich enough. From the South End ground the ore started in the Clinton and might probably have run a distance of 70 or 90 feet where the ore went along, and it extended perhaps 15 or 20 feet where we sunk an incline and began stoping out after the tunnel was constructed, and it may be 20 feet on the other side where the ore is so broken that we could not save it to profit, and from there to the Goodman there was nothing worth saving. There is no continuous body of ore that can be saved in the tunnel.

To take all the ore in the tunnel that could be saved and these little stringers and all together, it would be impossible to estimate it, but taking all that could be saved at a profit where it is wide enough, I would say it would average four inches in width all the way from the Red Jacket where we started to raise on through to 25 feet beyond the point where we started to raise up in the Clinton ground in the east raise.

The dip of the ledge is across the tunnel at different angles; sometimes it is nearly flat, but I will say at an angle of from 40 to 50 degrees at different places, and the ore dipped so that in places there would be five feet of ore on the strike of the ledge taken out by the excavation, and the ore in places would be left in the footwall at some distance up, and afterwards part of it was taken out by myself and others after the tunnel was excavated, so that there had been seven feet up and down of ore taken from the tunnel, because it had been left on one side. Taking the entire length of the tunnel there was no such a thing as eight feet of a ledge taken by the tunnel at any one point.

It is not reasonable, or even plausible to estimate the number of tons of ore taken out by the tunnel excavation in the Annie ground by multiplying 36 feet in length by eight feet high and 12 inches thick and dividing the result by 13. The ore is not continuous. Such a rule would not be proper, reasonable or even plausible to apply to the Red Jacket. The ore is not continuous there either and there is not that height of ore taken by the excavation. There was not an average width of a foot of ore in the mines traversed by the tunnel. It would not be a fair way to calculate the amount of ore taken out of the Clinton.

I went in the tunnel prior to any work being done to extend it. It had fallen in places and was filled up from the sides and top. It could not be used for prospecting or mining purposes without first cleaning and repairing it. Where I worked I would prefer to run a new tunnel than to fix up the old. It took me more time to clean it than it would to run a new tunnel. Charley Bowman and me made 45 cents a day repairing that old tunnel. Running the new tunnel at \$4 a foot we made as high as \$4 and sometimes as high as \$8 a day. We made 45 cents a day for a while repairing the old tunnel, and then Douglass gave us a little better lay out, and we cleaned it fifteen feet more for \$2.50 a day, and didn't complete it, and then he contracted with Mullaly for \$2 a day.

From the mouth of the tunnel on the Contact ground to the Annie, I would like to get a contract to run a new tunnel for \$5 a foot. The first ground through the Contact is hard blocky ground and when it was run when they were using black powder it may have cost \$12 a foot, but now it does not cost so much.

Take a tunnel $7\frac{1}{2}$ feet square from the Annie ground to the Goodman, and I don't think it has any value without the ore. Unless it interfered with some one working I would not put any value upon it at all.

Before the tunnel was constructed, I would not place any value on the Annie mine.

Before the tunnel was constructed the Red Jacket had no certain value and it was purely speculative.

Prior to the construction of the tunnel the Clinton had no value.

I think the construction of the tunnel has been beneficial

on the value of the mines through which it runs, because the mines showed nothing on the surface compared to what they show in the tunnel, and the Annie and Clinton were open to location prior to the running of the tunnel. I consider that the running of the tunnel has opened those mines, and that they are more valuable to-day from the work done. The defendants have taken out ore since the construction of the tunnel, which they could not have taken without the running of the tunnel, without they ran a tunnel or sunk a shaft themselves.

I would not consider it of any value to run the tunnel through any of the properties. I would not go to work to construct a tunnel as Douglass did and take all the ore for the right of way itself, and where there is no ore I can't say there is any value upon it at all.

Cross-Examination.

Under cross-examination by Mr. Deal, Mr. Naileigh testified as follows:

I took the contract to run the tunnel at \$4 a foot. The terms was that we was to follow the vein, and we knew the vein matter would break easier. We followed the vein all the way. I wanted to make as may feet per day as possible; the more feet I made the more money I made, and we worked the best way we could to make the most money; we knocked down as much rock at a blast as we could. We worked as best we could to make money. We paid more attention to the running of as many feet of tunnel per day as we could than to the value of the ore that was being taken out. Looking at the ledge to see how much the ore was worth was a secondary consideration. I

could not tell whether the ore taken out was worth \$10 a ton or \$100, except in the Red Jacket, where it was free milling ore. I could not horn the other ore. I took no assays. I don't think a man could make a dollar a day trying to save the ore taken out of the Annie.

The ore that I took out of the Red Jacket paid \$30 a ton; I think the ore I took out of the Clinton paid \$90 a ton. No person to-day can tell the value of the ore taken out of the claims by the tunnel excavation by reason of the fact that the ore was taken out and carried by the workmen with the waste and all dumped together in the creek. If there was any ore of value taken from the Annie, the mine is worth so much less. I don't consider there was anything in the Annie that would pay a dollar a day to save. The Red Jacket is worth to-day less the value of the ore taken out of it, and the same with the Clinton.

There was 648½ feet of tunnel already run and 250 feet of it was through hard blasting ground in the first part of the tunnel. Through that 250 feet of the tunnel I would take \$7 a foot to run it, and furnish everything. After striking the vein matter I would take a contract to run it for \$4 a foot. For repairing the tunnel he paid us 90 cents a foot at first and then \$2.50 a foot and Mullaly finished it for \$2 a foot; we made 45 cents a day at it. I understood the first 250 feet was let for 40 cents a foot. He paid Powers and us \$185 for retimbering, and I don't know what the material cost. The cost for the other part may have been \$550 for labor and material. I don't know whether the material could have cost \$200 or \$400; there is two lines of pipe and I don't know what they cost; it might exceed \$400. He paid us ten cents a foot to put the pipe in.

Indirectly I made a location of a placer claim in the American Flat ravine some little distance below where the rock was thrown out of the tunnel in order to save the the rock washed down from the tunnel; there had been two or three old tunnels run, and we believed if there was a heavy flood that it would wash the rock down. This location was made since this stuff was taken out of this tunnel. One of the reasons why I made the location was the fact that pay ore was taken out of the tunnel.

I took assays from the Clinton that went as high as \$170 a ton. I did not take them while running the tunnel—but after the tunnel was run. They were taken from the sides and top of the tunnel. We took an assay from a streak under the pay in the Clinton that went \$4 a ton.

I remember when Biggs paid us and the rest of the men in Cummings' house in Silver City. I never made any such statements there as "if you get what you are entitled to for taking this ore, you you will get a sack," speaking of what Douglass should pay for the right of way. I never said "if you get what you are entitled to, you will get a sack, because there was thousands of dollars' worth dumped in the creek." I might have said there was a thousand dollars' worth of ore dumped in the creek. I remember when we were trying this case in the circuit court in Carson that I said in the presence of Mr. Deal that Douglass had taken out large quantities of valuable ore from those mines and thrown it in the creek.

Redirect Examination.

If there is so much ore taken out from a place there is so much less to mine when you go to mine it, and a mine would be worth that much less, I suppose, except the cost

of milling and other costs. I would consider that the tunnel being in there and developing the mine to that extent would be a benefit to the mine owner regardless of the ore taken out.

I never worked the placer mine I located, and never considered it would pay me to work it. There might have been a thousand dollars' worth of ore thrown in the creek and a man sluicing might get \$500 of it.

I would not place any value on the ore taken out by that tunnel. The ore taken from the Red Jacket was the best, and that was taken out and saved until the ledge broke up in stringers and we were told it was no longer worth while to save. I would not run the tunnel for the ore in it. I have had assays made from ore taken from the tunnel since. I took as fair average samples from the top, bottom and sides of the tunnel as I could get. I don't think the ore in all the mines taken out by the tunnel would go six dollars a ton. I mean taking waste and all. But taking the size of the streak that would pay to work, I should take the ore that came out of the Red Jacket part of the tunnel to be worth \$30 a ton. That would run from 20 inches down to one and a half inches in width, and five feet high. The ore in the Clinton carefully taken out ought to be worth \$60 a ton. It runs in width from almost nothing to two inches and up to 12 inches at the biggest point. I would say in the Clinton it would average 4 inches wide for a distance of 80 feet, and run from four to five feet high, 80 or 90 feet in length.

MR. NAIGHLEIGH was subsequently recalled and testified as follows :

After the construction of the tunnel I had charge of

work taking out ore from the Red Jacket and Clinton mines for Mr. Biggs. I took out 13 tons of ore from the Clinton. We started on the side of the tunnel and stoped down seven feet and stoped along for 12 or 14 feet, and we took some ore on the other side almost at the extreme end where the ore showed; the ledge in the roof assayed \$4 a ton, but we thought we could do better, and didn't take that from above.

I think there was some 14 or 18 tons of ore taken out of the Red Jacket and saved. I would say there was 15 tons of ore there now which was saved from the Red Jacket while running the tunnel. Taking all the ore taken out from the Red Jacket and the Clinton and I don't think there was over \$1000 or \$1500 worth thrown in the creek that could have been saved.

I am satisfied that the ledge shown in the tunnel is the same ledge shown on the surface of the Red Jacket.

All the ore that was dumped in the creek from all the mines by the excavation of the tunnel from the Annie to the Goodman which might have been saved, I estimate might be worth from \$1000 to \$1500. I count all the ore that could have been saved by close working.

MR. NAILEIGH testified before the second commissioners as follows, after being first duly sworn:

I saw the old tunnel before it was cleaned out and repaired. Before I started work there the tunnel had been cleaned out to a certain point and timbers put in, and the ground had got in such condition that the parties working there couldn't handle it, and their timbers were pressed in and broke down, and we took a contract to go in the tunnel and clean it out. Our first work was to drive spil-

ing where the timbers came together, and the timbers had decayed and we had to cut our way through the old ground and drive spiling in to keep the roof up and lag it and breastboard it. There was great mounds in the tunnel where there was caves, and we crawled over mounds that were higher than the original roof of the tunnel. It was no use for any purpose either for drainage or mining before it was cleaned out. We began extending the tunnel at the point where the old tunnel terminated and extended it 502 feet. We began at about point "9" by this map between the sixth and seventh stations, on the Annie ground. All the ore we could get out of the Annie mine was about half a carload.

Cross-Examination by Mr. Deal.

The ledge followed by the tunnel I drove for Douglass shows in the upper tunnel and in the Annie and Clinton ground. We suppose it is the same ledge; we made an up-raise in the Red Jacket and followed the ledge all the way, from the tunnel level to the upper tunnel, and we made an air connection right through in the Red Jacket ledge. I think it is all the same formation in the Clinton, and the same ledge.

I would run a tunnel alongside of that tunnel for the first 300 feet at \$4 a foot, but I would not want to take it for 1000 feet at the same price. I think we got a dollar and a half a foot for repairing the old tunnel and retimbering it.

Ore has been taken in the Clinton claim immediately adjoining the tunnel that milled \$60 a ton, and the concentrates paid \$30 a ton in addition.

Ore has been taken right below and right above the tunnel itself in the Red Jacket that paid in the mill \$30 a ton.

I consider ore that pays \$12 a ton, or is worth \$12 a ton, pay ore. In the Clinton the assay above the tunnel went \$4 a ton and below the tunnel it went \$90 a ton.

The only way the value of the ore taken out by the tunnel excavation could have been ascertained would have been to have saved it by taking it out separately.

When I say pay ore I mean such ore as will yield a profit above cost of mining and milling.

R. C. HUNT, called upon the part of the petitioner, testified as follows, after being duly sworn:

I have resided at Silver City for 23 years, and I am a carpenter by trade and follow mining. I know the Devil's Gate and Chinatown Mining District. I have worked in the tunnel in controversy in the Clinton claim. Mr. Naighleigh had the contract and he hired me. He put me to work and showed me where to work, and told me to pick around and get the best I could find, and I done so. There was a ledge there for about twelve feet that would average about five inches of pay. The streak was small and we gouged it out; we worked underneath and took out the waste, and we spread sacks or canvas under and gouged the ore out, and put it in a car and if there was any waste in it we had a chance to take it out and leave the pure pay; it was by this method that we obtained rock that assayed so high.

I have looked through the tunnel; there is no continuous vein of pay rock from the Annie to the Goodman. There is no way by which I could determine the pay rock

in any portion of that ledge by taking a certain distance and multiplying that distance by any width and height, and dividing the product by 13 to ascertain the amount of rock taken out that would pay, because it is not continuous. You might take out parts of it that would pay here and there. Where I sunk I think there was enough good rock to carry out the poor rock and make it pay, and the extent of that was about 12 feet, and there was a good streak left at the bottom. The vein in the tunnel is what is called a spotted vein, and there are places where the ledge is barren.

From my observation I don't think there could have been over ten or fifteen carloads of pay rock that might have been taken out by the entire excavation.

The running of that tunnel was a benefit to the different claims through which it runs.

I would not fix any value for $7\frac{1}{2}$ feet square of ground through the Annie, or the Clinton or the Red Jacket for the right of way of the tunnel; I don't think it is of any value.

Multiplying the length, width and height of a bunchy and spotted ledge would give the number of tons of rock by dividing the result by 13, but such a rule of cubical measurement would not give the number of tons of pay ore. The only way they could measure the number of tons of pay ore in such a ledge would be to knock down the ore and put it in a car and measure it in that way.

Cross-Examination by Mr. Deal.

I don't know whether one thousand dollars' worth of ore was taken out by that tunnel or one million dollars. I have no knowledge of it; I have only an opinion. I have heard that four men took out \$30,000 worth of ore from

the Oest mine, which is near these claims. I have worked in the Oest mine; it is not such a pockety mine as the others around there.

We took ore out of the tunnel in question in the Clinton, by digging right in the bottom of the tunnel, and we took out thirteen tons in about forty shifts; we did not take the thirteen tons all from the same place; there was about nine tons taken out in that place. In the tunnel itself the chances is there was spots of as good ore as we took out. But where we dug the ore was better than it was at the top of the tunnel, and the chances are that between it did not average as good as what we took out. If the ore is good on top of the tunnel and good at the bottom the chances is it was good all the way between, but if you find it poor on top and poor on the bottom the chances is it was poor between; the only way I can judge of the value of the ore taken out by the tunnel is by looking at the ore that is left on the top of the tunnel and at the bottom; I think it is a good sign of what was taken out between.

We took out an excavation from the bottom of the tunnel six feet deep, twelve feet long and five inches wide, and it paid \$60 a ton.

In the Clinton you could not tell the value of the ore except by having it assayed; there was too much iron in it.

If the men who run the tunnel took no hornings or assays, I don't see how they could tell the value of the rock they took out.

Redirect Examination.

If that had been a solid and continuous body of pay ore it would show itself in the top, bottom and sides of the tunnel; we worked where it showed good at the bottom and

poor at the top and it is not likely it petered out just at the top.

The following is a copy of the final decree in said circuit court in this suit in equity.

In the Circuit Court of the United States, Ninth Circuit, and District of Nevada. J. M. Douglass, et al., Petitioners, v. James D. Byrnes, et al., Defendants. No. 574.

This proceeding was regularly brought on for hearing on the 26th day of September, 1893, before the Court sitting without a jury, a jury trial having been expressly waived by the respective parties in open court. F. M. Huffaker and J. L. Wines appeared as counsel for said petitioners, and W. E. F. Deal and E. L. Campbell for said defendants, to show cause why the prayer of the petitioner herein should not be granted, and the several parts of the mining claims as described in said petition appropriated to the use of said petitioners as prayed for, and said defendants having made and filed an answer in writing to said petition denying that it is necessary or proper that the land described in said petition or any part of it, should be appropriated to the said use of the petitioners. The matter was proceeded with and the respective parties introduced their proof, oral and documentary, which being concluded, the defendants by their counsel moved that the Goodman Silver Mining Company, a corporation, be made a party petitioner herein, which was done by the Court. Whereupon the matter was by consent of the respective parties submitted to the Court for its decision and judgment, upon briefs to be thereafter filed, which was done by the respec-

tive counsel within the time designated therefor. The matter was taken under advisement by the Court, and the Court having fully considered the same and being advised in the premises, did thereafter and on the 18th day of December, 1893, in open court, render its decision and judgment to the effect that the prayer of said petition should be granted and the right of way for the tunnel as set out in said petition, through the several mentioned mining claims, appropriated to the use of said petitioner, and that commissioners should be appointed to ascertain and report the compensation to be paid therefor, as by the statute in such case made and provided is required. That thereafter, on to-wit, the 15th day of January, 1894, in open court, the plaintiffs and petitioners, naming on their part E. Strother for one of such commissioners, and W. E. F. Deal, as counsel for The Red Jacket Consolidated Mining Company, naming C. E. Mack, and the Court naming on its part R. P. Keating, the Court duly appointed said persons as the commissioners herein. That said persons thereafter qualified as such commissioners and made and filed reports herein, C. E. Mack and R. P. Keating filing a majority report, and E. Strother, a minority report. That thereafter and within the time provided by law and upon proper notice, petitioners filed their exceptions to said report, and moved to set the same aside, and grant them a new trial herein, which said exceptions and motion were regularly brought on for hearing before the Court on the 18th day of June, 1894, and were argued by respective counsel and submitted to the Court for its decision and judgment thereon, and the same was by the Court taken under advisement, and the Court having fully considered

the same and being sufficiently advised in the premises, did on the 9th day of July, 1894, in open court, render its decision and judgment, sustaining the exceptions of petitioners to said report, on the ground of irregularity on the part of commissioner C. E. Mack, that prevented petitioners from having a fair trial, and ordered that said reports be set aside and said commissioners be discharged and the matter submitted to other commissioners, and the matter by consent of respective parties was continued for the suggesting and appointment of such commissioners. That thereafter and on, to-wit, the 6th day of August, 1894, this matter was again brought on for the appointment of commissioners, F. M. Huffaker appearing as counsel for petitioners, and W. E. F. Deal for The Red Jacket Consolidated Mining Co., whereupon several names were suggested by counsel for petitioners from which to select a commissioner, and H. M. Clemmons was named for a commissioner by W. E. F. Deal, Esq., and the Court continued the matter for one week to consider the appointment of commissioners, and accordingly on the 13th day of August, 1894, the Court appointed as such commissioners, Joseph R. Ryan, of those named by petitioners, H. M. Clemmons, named by said counsel for said defendants, and H. M. Gorham, named by the Court, and fixed their first meeting at the city of Virginia, for August 21, 1894, at which time said commissioners met, duly qualified and proceeded with the matter for which they were appointed, and thereafter made and filed their report herein on the 3rd day of September, 1894, the same being the day designated by the Court in its order appointing said commissioners.

That thereafter, and on, to-wit, the 22nd day of Septem-

ber, 1894, W. E. F. Deal, on behalf of said defendants, filed exceptions to said report and gave notice that on the 2nd day of October, 1894, said counsel would move said Court to set aside said report on the grounds specified in said exceptions, or as soon thereafter as the matter could be heard by the Court; whereupon counsel for petitioners moved the Court to strike said exceptions from the files on the ground that the same were not filed and noticed within the time specified by law for filing such exceptions, and thereafter by consent of respective counsel the Court ordered that said matters be set for hearing on Wednesday, the 12th day of December, 1894, on which day said matters were regularly brought on for hearing before the Court, W. E. F. Deal, Esq., appearing as counsel for the defendants, and F. M. Huffaker and J. L. Wines for petitioners; whereupon after argument by counsel the Court took said matters under advisement, and thereafter, and on this 18th day of March, 1895, the Court being fully advised in the premises, delivered its decision and judgment in open court and finds that the evidence sustains the said report of the commissioners, and that the same should be approved.

Wherefore, it is ordered, adjudged and decreed that the said exceptions thereto be and the same are hereby overruled, and defendants motion for a new trial denied, and said report be and the same is hereby allowed, approved and confirmed. It is further ordered that petitioners pay the costs of this proceeding. That commissioners E. Strother, R. P. Keating, C. E. Mack, H. M. Clemmons, Jos. R. Ryan and H. M. Gorham, be and they are hereby allowed the sum of one hundred dollars for services; also that C. E. Mack be paid \$31 expenses; and Peterson & Sam-

uels \$8 for team, and \$101 to Alf. Chartz, for fees as reporter for second commissioners.

Done in open court March 18, 1895.

HAWLEY,
Judge.

Wherefore, defendants pray that this, their bill of exceptions and statement on appeal, may be allowed and settled, and that they be allowed an appeal from said final decree and from the order of the court denying their motion for a new trial, to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated June 7, 1895.

W. E. F. DEAL,
Solicitor for Defendants, except South End Mining Co.

The above and foregoing bill of exceptions was presented to me for settlement on June 8, 1895, and I hereby certify that I settled the same and allowed the same, and that the same is correct.

HAWLEY,
Judge.

Dated January 11, 1896.

[Endorsed]: No. 574. U. S. Cir. Court, Dist. of Nevada. J. M. Douglass, et al., v. J. D. Byrnes, et al. Bill of Exceptions and Statement on Appeal. Filed June 8, 1895. T. J. Edwards, clerk.

Order allowing appeal, etc., as entered on the minutes,
Jan'y 13, 1896.

JOSEPH M. DOUGLASS and THE	}
GOODMAN MINING CO.,	
	Plaintiffs,
vs.	
JAMES D. BYRNES, ET AL.,	}

Order Allowing Appeal.

James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs and The Red Jacket Consolidated Mining Company, defendants in the above-entitled cause, having moved the Court on the 5th day of August, 1895, for an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree entered in this cause and from the order of the Court denying them a new trial herein, it is now ordered that said appeal be and the same is hereby allowed as of said 5th day of August, 1895.

It is further ordered, that said defendants have 20 days from this date to file a bond on appeal, as required by the former order of this court, and for the issuance and service of a citation herein.

Order fixing bond, of date August 5, 1895.

DOUGLASS, ET AL.,)
 vs.)
BYRNES, ET AL.)

Order Fixing Amount of Bond, etc.

On this day came Mr. Deal, solicitor for defendants, and moved the Court for an order allowing an appeal herein, which motion was taken under advisement. It is further ordered that the bond on appeal herein be and the same is hereby fixed at one thousand dollars; and that defendants have until the 12th instant to file their notice declining to accept the plaintiffs' proposed amendments to their bill of exceptions, or statement on appeal.

*In the Circuit Court of the United States for the Ninth Circuit
 and District of Nevada.*

J. M. DOUGLASS and THE GOOD-
 MAN GOLD AND SILVER MINING
 COMPANY, a Corporation,)
 Petitioners,)
 vs.)
 JAMES D. BYRNES, ET AL.,)
 Defendants.)

Opinion.

Petition to condemn the right of way for a tunnel through certain mining ground.

F. M. Huffaker, and Baker, Wines & Dorsey, Attorneys for Petitioners.

E. L. Campbell and W. F. Deal, Attorneys for Defendants.

HAWLEY, District Judge. (Orally.)

The Goodman Gold and Silver Mining Company, a corporation organized and existing under the laws of the the State of Nevada" (Gen. Stat. Nev. 256-273), to condemn mining ground situate in the Devil's Gate and Chinatown Mining District, known as the Goodman mine.

J. M. Douglass is the owner and holder of a controlling interest of the capital stock of said corporation, and now is, and for two years last past, has been engaged in working the Goodman mine for his own benefit, in his own individual interest, at his sole expense and outlay, with the knowledge and consent of said corporation. Having such ownership and interest in the Goodman mine they claim the right, under the provisions of the "Act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada" (Gen. Stat. Nev. 256-273), to condemn the right of way for a tunnel seven and one-half feet wide by seven and one-half feet high from the Contact mine through five intervening mining claims and locations, viz. The Atlantic, Annie, Red Jacket, South End, and Clinton, to the Goodman mine, and to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel.

The evidence shows that several years ago a tunnel was run through the Contact mine into the Atlantic ground; that a portion of this tunnel, by lapse of time and now

use, had become out of repair; that petitioner Douglass claims to be the owner of the one-half of the Contact mine; that the defendants, Byrnes and Mulville, claim to be the owners of the tunnel from its mouth on the Contact mine into the Atlantic mine and they claim that any interest which Douglass may have in the Contact mine is held in trust for them and is subject to their rights to work the Atlantic through the tunnel; that in February, 1892, petitioner Douglass located a tunnel right, under the act of congress, commencing at the mouth of the old tunnel on the Contact mine and running through the intervening mining claims before mentioned to the Goodman mine; that he cleaned out the old tunnel running into the Atlantic ground and repaired it and has constructed a tunnel the balance of the way through the other claims to the line of the Goodman mine; that the defendants, Byrnes and Mulville, claiming to be the owners of the Atlantic ground and the old tunnel, commenced an action in ejectment to recover the possession of the tunnel; that thereafter this proceeding was instituted in the State district court, by Douglass, and subsequently removed to this court, and the Goodman Mining Company was, upon motion of defendants, made a party petitioner herein; that a feasible, economical, direct and convenient way of running the tunnel is on the line which Douglass selected; that a tunnel could have been constructed a few feet higher, or lower, or a few feet on either side thereof so as not to interfere with the old tunnel, without much more inconvenience or expense, but no place could have been selected without the necessity of running through the ground of various mining claims before reaching the Goodman mine; that the Atlantic, Red Jacket and South End

are patented mining claims, and the Annie and Clinton are not patented.

Section 1 of the act of the legislature of the State of Nevada, reads as follows: "The production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."

Section 2 provides, among other things, that: "Any person, company, or corporation engaged in mining, milling, smelting, or other reduction of ores may acquire any real estate, or any right, title, interest, estate, or claim therein or thereto necessary for the purposes of any such business, by means of the special proceedings prescribed in this act."

Section 6 provides that: "Upon the hearing of the allegations and proofs of the said parties, if the said court or judge shall be satisfied that the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition, then such Court or judge shall appoint three competent and disinterested persons as commissioners."

Other sections of the act provide how the proceedings shall be commenced, what shall be set forth in the petition, who shall be made defendants, how the commissioners shall be selected, the manner in which they shall proceed, etc.

The question whether the defendants, Byrnes and Mulville, are the owners of the tunnel right of way from its mouth of the Contact mine into the Atlantic ground need

not be determined at this stage of the proceedings. The act contemplates that the parties having any right, title or interest in the lands sought to be condemned shall make proof of their interest in the land and of its value before the commissioners. In fact this Court cannot, at the present time, determine any question of title to any of the mining claims for it may be that other parties who have not appeared and answered the petition will appear and assert some right, title or interest before the commissioners, if any are appointed. Section 3 of the act provides, that:

“The persons in occupation of said tract or tracts of land, and those having any right, title, or interest therein, whether named in the petition or not, shall be defendants thereto, and may appear and show cause against the same and may appear and be heard before the commissioners herein provided for, and in proceedings subsequent thereto, in the same manner as if they had appeared and answered said petition.”

The Court at the present time can only be called upon to determine whether “the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition,” as provided in section 6, and whether the act authorizes such lands to be condemned for the purposes set forth in the petition. The constitutionality of the act and the fact that the business of mining is a “public use” in this State, is settled and determined by the decisions of the supreme court in *Dayton v. Seawell*, 11 Nev. 394, and *Overman v. Corcoran*, 15 Nev. 147; see also *Lewis on Em. Dom.* sections 1,184; *Mills on Em. Dom.* section 20. The power of the legislature having been fully recognized and sanctioned, the purpose of the act should not be hampered by any narrow or technical objections. The impor-

tance of encouraging the mining industry of this State must be kept in view. This was the object, intent and purpose of the legislature in passing the act, and its wisdom, policy and expediency was thereby determined. A reasonable, fair, just, broad and liberal view should be taken by the Court in interpreting its provisions.

Defendants claim that the petition should be denied because the evidence shows that there were other places in the vicinity as well adapted as the one selected by Mr. Douglass where the tunnel could have been run without interfering with the old tunnel on the Contact and Atlantic mining claims. The testimony upon this point is not relevant to the real issues in the case. A large discretion is necessarily invested in petitioners in the selection of the route for the tunnel. It must be presumed that self-interest if nothing else, will dictate that they would not abuse this power. It is not within the power of the Court to absolutely control the exercise of this discretion in selecting the land to be condemned. It will not be reviewed by the Court unless it appears that they have exceeded the authority of the statute and have acted in bad faith. In *Overman v. Corcoran*, there is a complete answer to the claim made by defendants upon this point. The Court in that case, in reply to a similar contention, said: "It may, for the sake of the argument, be admitted, as claimed by appellants, that respondent could have gone six hundred feet further west or six hundred feet further east and procured other land upon which to erect the necessary hoisting works and sink a shaft. The record, however, shows that all the adjacent lands are located and claimed as mining locations; hence the same objection could have been

urged wherever the location of a site was chosen, and if this fact should be considered of sufficient importance to prevent the condemnation of the lands in question, then it would follow that no lands could ever be procured by the respondent under the act of the legislature. This case would then come within the category of cases which, as was said in *Dayton G. & S. M. Co. v. Seawell*, were liable to happen, that 'individuals, by securing a title to the bar-their lands for a just and fair compensation, which capi-within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capi-tal is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities,' and confirms the opinion there advanced, that 'the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining.' The law does not contemplate that an 'absolute necessity' should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary.

The position contended for by appellants is not sustained by any sound reasoning, and is wholly unsupported by authority."

See also *N. Y. & Harlem R. R. Co.* 46 N. Y. 553; *Boston & Albany R. R. Co.* 53 N. Y. 576; *N. Y. Central R. R. Co. v. Metropolitan Gas Co.* 63 N. Y. 326; *Mills on Em. Dom.* section 62; *Lewis on Em. Dom.* section 395.

The real question is whether the site selected by petitioners can be condemned. It will be conceded, as claimed by defendants, that no person can appropriate

any land for his own mere private use and convenience. But the petitioners are not seeking to condemn any lands solely for their own private gain or, from wilful or malicious motives, to injure or destroy the rights of other parties. The act of Douglass in taking possession of the premises and constructing the tunnel without first obtaining the consent of the owners of the mining claims through which it passes, or taking the necessary steps to condemn the right of way, to some extent, accounts for, if it does not justify, the criticism of counsel as to his conduct. But "the Courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights." (Lewis on Em. Dom. section 395.)

The duty of this Court ends by determining whether the course now being pursued can be sustained. It cannot be claimed that the petitioners, by the institution of this proceeding, are attempting to wrongfully obtain possession of any of the mining claims owned by other parties, or to destroy any rights which the owners of such claims may have therein. They only ask the right to condemn an easement—a right of way, to construct and maintain a tunnel—through the mining lands owned by other persons or corporations so as to enable them to properly drain, work and develop the Goodman mine. The tunnel commences on a level with American Flat ravine and the land, upon which the mining claims are located, rises steeply from the mouth of the tunnel. The evidence shows that it is necessary to construct a tunnel through the other mining claims in order to properly drain the water from the Goodman mine. Other attempts to accomplish this purpose by the erection of expensive hoisting works and machinery have proved unavailing for that

purpose. The Goodman mine cannot be successfully worked without the aid and advantage which such a tunnel will give. There is as much of a necessity for the running of this tunnel as there was for the construction of the road to the works of the Dayton M. & M. Co. in *Dayton v. Seawell*, or for the sinking of a shaft in *Overman v. Corcoran*, and in the light of those authorities, and of the principles therein discussed and announced, it seems clear to my mind that this case comes strictly within the provisions of the statute authorizing condemnation to be made.

A tunnel properly constructed through a mining claim cannot, as a general rule, be said to seriously interfere with the rights of the owner. Ordinarily the running of such a tunnel would prove to be of great advantage and benefit to the several mining claims through which it passes and especially would this be so if proper provision could be made for the owners of such claims to have the use and occupancy thereof, in common with others, for the purpose of working their respective mines. But in any event it is difficult to see what particular objection can be urged to the running of the tunnel if proper damages are assessed for the injury that may be caused to the mining claims through which it passes. As was said by the Court in *Dayton v. Seawell*: "The property of the citizen is sufficiently guarded by the constitution, and he is protected in its enjoyment and use, except in the extreme cases of necessity where it is liable to be taken for the purpose of advancing some great and paramount interest which tends to promote the general welfare, and prosperity of the State; and when it is understood that the exercise of this power, even for uses confessedly for the public benefit,

can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation to the citizen whose property is thus taken, none of the dangers of future legislation predicted by respondent's counsel, is at all likely to happen." But it is vigorously contended that the act does not authorize the condemnation of mining claims or mining ground and that, if mining is a public use, the land in question was, at the time this proceeding was instituted, appropriated to such public use and cannot be condemned by any other mining company, corporation or individual. The argument upon these points extended over a wider range than it is necessary for the Court to travel in deciding this case. The term "real estate" as used in the statute was evidently intended to apply to all lands, whether agricultural, timber or mineral. The language of section 2 of the act, heretofore quoted, is broad and comprehensive enough to include any interest in any lands.

The question whether the general terms of this statute will authorize the taking of property that has already been dedicated to a public use depends upon the circumstances, conditions, surroundings and necessities established by the facts of each particular case. The land in question has never been dedicated to the public use except in the sense that the business of mining is of "public utility, benefit and advantage" to the people of this State as declared in *Dayton v. Seawell*.

Upon the facts of this case, and under the provisions of the statute, it may safely be said that an easement may be

acquired *in invitum* in lands held and occupied for a public use when such easement may be enjoyed without detriment to the public or serious interference with the use to which the lands are devoted.

Mills on Em. Dom. sections 44. 45. 47; Lewis on Em. Dom. section 276; Rochester Water Commissioners, 66 N. Y. 413; N. Y. Central R. R. Co. v. Metropolitan Gas Co. *supra*; Morris and Essex R. R. Co. v. Central R. R. Co. 31 N. J. L. 213; Peoria P. & J. R. R. Co. v. Peoria & S. R. R. Co. 66 Ill. 174; N. Y. L. & W. Railway Co., 99 N. Y. 13.

This case does not come within any of the exceptions to this rule. In Mills on Eminent Domain it is said: "Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained; or if the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise." Section 47.

The general principles upon this subject are summed up in Lewis on Eminent Domain, section 276, as follows: "Fourth. Whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject matter. If the language of the statute is explicit as where a particular turnpike is authorized to be taken and laid out as an ordinary highway, the courts have nothing to do but to give effect to the express language of the statute. But, if the language of the statute is not explicit, then it

is a question of *reasonable intendment*, in view of all the circumstances of the case. Authority to construct a railroad through a narrow gorge already occupied by a public way would authorize the use of the old way if the new road could not reasonably be built without it. The chief difficulty arises when authority to condemn property for any purpose is given in general terms, as is usually the case in these latter years. In such case the presumption is against the right to take property which is already devoted to public use. This presumption may be overcome by showing a reasonable necessity for the property desired as compared with its necessity and importance to the use to which it is already devoted."

After a careful examination of the evidence it appears, to my satisfaction, that the appropriation of the right of way for the tunnel through the mining claims of defendants to the Goodman mine will be of great benefit and advantage to the mining industry of Lyon county, where the claims are situated; that it is necessary to condemn the lands asked for in the petition for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss, damage or inconvenience to the defendants.

This conclusion brings the case within the provisions of the statute, and shows that a necessity exists for the exercise of the law of eminent domain. (Dayton v. Seawell, *supra*; Overman v. Corcoran, *supra*.)

In due time, after notice to parties, an order will be made appointing commissioners to ascertain and assess the damages.

[Endorsed]: No. 574. U. S. Cir. Court, Dist. Nevada.
J. M. Douglass, et al., v. Jos. D. Byrnes, et al. Opinion.
Filed Dec'r 18, 1893. T. J. Edwards, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

JOSEPH M. DOUGLASS and GOOD-
MAN MINING COMPANY,
Plaintiffs,
vs.
JAMES D. BYRNES, ET AL.,
Defendants.

Bond on Appeal.

Know All Men by These Presents, that we, James Loughran and George A. Morgan, of the county of Storey, State of Nevada, are held and firmly bound unto Joseph M. Douglass and the Goodman Mining Company, in the full sum of one thousand dollars lawful money of the United States, to be paid to the said Joseph M. Douglass and the said Goodman Mining Company, or to their administrators, assigns, or successors, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this twenty-third day of January, 1896.

Whereas, at a term of the Circuit Court of the United States, Ninth Circuit, for the District of Nevada, in a suit pending in said court between Joseph M. Douglass and

the Goodman Mining Company, and James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs, Red Jacket Consolidated Mining Company, and others, defendants, a final decree was duly rendered, confirming the report of the commissioners appointed by said circuit court in said action, and denying said defendants' motion for a new trial therein, and the said defendants having appealed the said suit and filed a copy thereof in the said circuit court, and having served and filed the citation directed to the said plaintiffs citing and admonishing them to be and appear at a term of the Circuit Court of Appeals of the United States, for the Ninth Circuit, to be holden at San Francisco, State of California, on the 17th day of February, 1896.

Now the consideration of this obligation is such that if the said James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs and The Red Jacket Consolidated Mining Company shall prosecute the said appeal to effect, and answer all damages and costs, if they fail to make their appeal and plea good on appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered this 23rd day of January, 1896.

JAMES LOUGHRAN, [Seal]

GEO. A. MORGAN, [Seal]

Witness to signature of James Loughran:

W. E. WINNIE.

Witness to signature of Geo. A. Morgan:

W. E. WINNIE.

I, Thomas P. Hawley, District Judge, presiding as Circuit Judge, hereby approve the within and foregoing bond. January 24th, 1896.

THOMAS P. HAWLEY,
U. S. Judge.

[Endorsed]: No. 574. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Joseph M. Douglass, and Goodman Mining Company, Plaintiffs v. James D. Byrnes, et al, Defendants. Bond on Appeal. Filed Jan'y 24, 1896. T. J. Edwards, Clerk.

(Justification of sureties on foregoing bond.)

State of Nevada, }
County of Storey. } ss.

James Loughran and George A. Morgan, whose names are subscribed as sureties to the foregoing bond, being severally duly sworn, each for himself, deposes and says that he is a resident and householder within the county of Storey, State of Nevada, and is worth the amount for which he becomes surety on said bond over and above all debts and liabilities, in unincumbered property, situate within this State, exclusive of property exempt from execution.

JAMES LOUGHRAN.
GEO. A. MORGAN.

Subscribed and sworn to before me this 23rd day of January, 1896.

[Notarial Seal]

W. E. WINNIE,
Notary Public, Storey County, Nevada.

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}	No. 574.
Complainants,		
vs.		
J. D. BYRNES, ET AL.,		
Defendants.		

Clerk's Certificate.

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing pages, numbered from 1 to 123, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs for making this record amount to the sum of \$89.50, and that the same have been paid by the defendants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said circuit court at the Clerk's office in Carson City, Nevada, this 20th day of February, A. D. 1896.

[Seal]

T. J. EDWARDS,
Clerk U. S. Circuit Court.

*In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.*

JOSEPH M. DOUGLASS and GOOD-	}
MAN MINING COMPANY,	
Plaintiffs,	
vs.	
JAMES D. BYRNES, ET AL.,	}
Defendants.	

Citation.

The United States of America to Joseph M. Douglass and the Goodman Mining Company, Greeting:

Whereas, James D. Byrnes, Edward Mulville, H. C. Biggs, Maggie Lee McMillan and The Red Jacket Consolidated Mining Company, defendants in the above-entitled action, have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree of said circuit court, confirming the Report of the Commissioners appointed in said action, and denying the said defendants a new trial therein duly made and entered against said defendants, in said Circuit Court of the United States, for the Ninth Circuit, District of Nevada, and in favor of you, the said Joseph M. Douglass, and you, the said Goodman Mining Company, and whereas the said defendants have filed the security required by law to perfect such appeal,

Now, you and each of you are cited hereby to appear before the said United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of Cal-

ifornia, on the 24th day of February, 1896, the same being at the February term, then and there to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the town of Carson City, in said District of Nevada, on the 24th day of January, 1896.

THOMAS P. HAWLEY,
Judge of the District Court of the United States, presiding
as Judge in said Circuit Court.

Service of the foregoing citation is hereby admitted this 25th day of January, 1896.

F. M. HUFFAKER,
Solicitor for Plaintiffs.

[Endorsed]: No. 574. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Joseph M. Douglass and Goodman Mining Company, Plaintiffs vs. James D. Byrnes, et al., Defendants. Citation. Filed Jan'y 27, 1896. T. J. Edwards, Clerk.

[Endorsed]: No. 284. In the United States Circuit Court of Appeals for the Ninth Circuit. James D. Byrnes et al., Appellants vs. J. M. Douglass, et al., Appellees. Transcript of Record. Appeal from the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Filed February 24th, 1896,

F. D. MONCKTON,
Clerk.

No. 284.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,
Appellants,
VS.

J. M. DOUGLASS ET AL.,
Appellees.

Brief for Appellants.

W. E. F. DEAL,
Attorney for Appellants.

Filed June....., 1896.

FILED
JUN 8 - 1896

.....
Clerk.

No. 284.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,

Appellants,

VS.

J. M. DOUGLASS ET AL.,

Appellees.

STATEMENT OF THE CASE.

This proceeding was brought in the court below by J. M. Douglass, originally as plaintiff, against appellants and the South End Mining Company as defendants, in the District Court of the State of Nevada, Lyon county, under the provisions of the Act of the Legislature of the State of Nevada entitled, "An Act to Encourage the Mining, Milling, Smelting or other Reduction of Ores in the State of Nevada," approved March 1, 1875 (General Laws of Nevada, Bailey & Hammond, 1885, Sections 256 to 273, both inclusive).

The case was removed by the defendants from the State Court to the Circuit Court of the United States, Ninth Circuit, District of Nevada. After the removal the Goodman Mining Company was, by the order of the court below, made a party plaintiff (Record, p. 30). Appellants filed an answer to the order to show cause and to the petition or complaint. The court below overruled the objections made by the answer. The decision set forth in the Record (pp. 140-151) was rendered by the court below upon the hearing of the objections to the answer.

Joseph R. Ryan, H. M. Gorham and H. M. Clemmons were then appointed Commissioners to ascertain and assess the compensation to be paid to the defendants having or holding any right, title or interest in or to the tracts of land or mining claims described in the pleadings for or in consideration of such lands to the use of petitioners. Before the hearing was concluded the South End Mining Company settled with the plaintiffs (Record, p. 30).

The Commissioners, after taking testimony and performing the other duties required of them, made their report and findings to the court below (Record, pp. 32, 33).

The defendants, except the South End Mining Company, moved the court below to set aside the report and grant them a new trial upon the grounds and objections set forth in the Record, pp. 34-41.

The court below overruled defendants' objections, and denied their motion for new trial (Record, p. 41).

Appellants filed their bill of exceptions and specifications of errors in the court below, which were duly settled and allowed (Record, p. 136). Appellants moved the court below for an appeal to this court, which was allowed (p. 138).

**ASSIGNMENT OF ERRORS MADE IN THE
COURT BELOW.**

The order and decree of said Circuit Court is erroneous and against the just rights of said defendants for the following reasons :

First—The evidence showed that a part of the right of way sought to be condemned consisted of a tunnel which was owned by the defendants James D. Byrnes and Edward Mulville, who were also owners of the Atlantic Consolidated mine, for the working of which said tunnel was constructed by the predecessors in interest and grantors of defendants James D. Byrnes and Edward Mulville. The evidence showed that at the time of the commencement of this suit and proceedings J. M. Douglass, one of the plaintiffs, was in possession of said tunnel, as tenant of the defendants Byrnes and Mulville. That said tunnel had, before the time when J. M. Douglass became said tenant, been run and completed a distance of 648 feet from its mouth, and that said tunnel was a part of said Atlantic Consolidated mine, and was the lowest adit of said mine, and the most convenient means of working the same. And these defendants show that said tunnel was, at the time of the

commencement of these proceedings and suit, already used by defendants Byrnes and Mulville, and their tenants, for mining purposes, and defendants show that said tunnel was not, under the provisions of said Act of the Legislature, subject to condemnation for the use of any other persons, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose (pp. 42, 43 of Record).

Second—The decision of said Circuit Court confirming said report and denying said motion for new trial was erroneous in that the Commissioners in their report found and decided that H. C. Biggs and Maggie Lee McMillan are the owners each of an undivided one-fourth interest in the Contact claim and mine and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary line of the Contact claim, and said Commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation whatever for said tunnel through the Contact claim, or for said right of way through said Contact claim (p. 111 of Record).

Third—The decision of said Circuit Court confirming said report and denying said motion for a new trial is erroneous in that the Commissioners in their report decided and found that H. C. Biggs and Maggie Lee McMillan are the owners of the Annie and Clinton mines, and that the Red Jacket Consolidated Mining Company is the owner of the Red Jacket mine, and that the petitioners are entitled to the right of way for

the tunnel mentioned in the amended petition through each of said mines, and no compensation whatever is awarded the said owners of said mining claims, or either of them, for said right of way (pp. 111, 112 of Record).

Fourth—The said decision of said Circuit Court in confirming said report and denying said motion for new trial is erroneous in that the completed tunnel through said Contact claim from the mouth of said tunnel to the western boundary line of said Contact mine, a distance of 299 feet, was worth at the very least \$2,990, and it would have cost the plaintiff at least \$2,990 to construct such a tunnel to the west line of said Contact claim, and yet said Commissioners did not award any compensation to the owners of said tunnel for said tunnel, or the right of way through said Contact claim (p. 112 of Record).

Fifth—The said decision of said Circuit Court in confirming said report and denying said motion for a new trial is erroneous in that the tunnel through said Atlantic Consolidated mine and into the Annie ground already constructed by the owners of the Atlantic Consolidated mining claim and their predecessors in interest and grantors, the same being 349 feet in length, was worth \$2,000, and it would have cost plaintiff \$2,000 to construct the same; yet the Commissioners awarded James D. Byrnes and Edward Mulville \$1,021.95 (pp. 112, 113 of Record).

Sixth—The said decision of the Circuit Court in confirming said report and denying said motion for new trial is erroneous in that no compensation is

awarded by the Commissioners for the damage sustained by the defendants H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company by the wrongful acts of plaintiff J. M. Douglass in running the tunnel through the ledge in the right of way condemned, through the Annie, Clinton and Red Jacket mines, and in taking out the ore excavated in running the tunnel, and throwing it away instead of saving it for the owners thereof.

The evidence showed that immediately after these proceedings commenced plaintiff J. M. Douglass, under an order of court made in the case under the statute, took possession of the right of way described in the amended petition, and ran a tunnel upon the ledge, through the Annie, Clinton and Red Jacket claims, and threw pay ore away over the dump, so that by his acts it was lost to the owners of said claims (p. 113 of Record).

FACTS ESTABLISHED BY THE TESTIMONY TAKEN BEFORE THE COMMISSIONERS.

The Atlantic Consolidated mining claim was, at the time of the commencement of these proceedings, and ever since has been, owned by the appellants James D. Byrnes and Edward Mulville. The Commissioners so report and find (Record, p. 32): * * * "James D. Byrnes and Edward Mulville are the owners of the "Atlantic Consolidated Mine," and they also report and find (Record, p. 33): "*Sixth*—We find the right "of way through the Atlantic Consolidated mine is of

“ the value of one thousand twenty-one dollars and
“ ninety-five cents, and we accordingly assess the
“ damages to said mine at said sum, to be paid to
“ defendants James D. Byrnes and Edward Mulville
“ the owners.” These findings, as to title, are in
accordance with the allegations of the petition and the
proofs (Record, pp. 7, 43-45).

A United States patent was issued to the Atlantic Consolidated Mining Company, one of the predecessors in interest and grantors of appellants Byrnes and Mulville, on April 29, 1876 (Record, p. 43). A judgment was rendered in the State District Court on June 24, 1891, in favor of J. D. Blackburn against the Atlantic Consolidated Mining Company for \$1,132 and interest and costs. Upon this judgment an execution was issued, under which the Atlantic Consolidated mine was levied on and sold to W. E. F. Deal, to whom a certificate of sale was issued. This certificate was assigned by the purchaser to William Feehan. No redemption from the sale having been made, the Sheriff conveyed the property to William Feehan on February 16, 1892, who afterward and on March 19, 1892, conveyed the property to James D. Byrnes and J. J. Green, and on February 25, 1893, J. J. Green conveyed his interest to Edward Mulville (Record, pp. 43, 44).

A tunnel had been constructed by the Atlantic Consolidated Mining Company before the patent was issued to work and drain the Atlantic Consolidated mine. This tunnel had been constructed a distance of 648 feet by the company (page 115) before the appellee Douglass came into possession of it as the tenant of

the Atlantic Consolidated Mining Company. It commenced on a claim formerly known as the Cadiz, which claim at one time was owned by the company. The Cadiz claim became subject to relocation by failure to do the necessary work to hold it under the United States mining laws, and was relocated by Thomas P. Mack, who lost it in the same way, and it was then again located under the name of the Contact claim by C. E. Brown, in 1890 (Record, p. 45; testimony of Thomas P. Mack, p. 50). Before this location of the Contact was made the tunnel penetrated the company's ledge (Thomas P. Mack, p. 50). This tunnel is the lowest tunnel through which the company's claim can be worked, and it is necessary to the working of the claim (Thomas P. Mack, p. 55; James D. Byrnes, p. 101).

The testimony showed, without any conflict, whatever, that this tunnel was run and owned by the predecessors in interest and grantors of appellants Byrnes and Mulville. It was laid down upon the plat accompanying the patent as part of the grantee's work.

Testimony of Thomas P. Mack, pp. 55-59.

- “ “ W. H. Stanley, pp. 94-98.
- “ “ F. S. Lacrouts, pp. 73, 74.
- “ “ J. D. Byrnes, pp. 100, 101.
- “ “ J. D. Blackburn, pp. 101-103.
- “ “ Theodore Vincent, p. 103.
- “ “ J. F. Angell, p. 106.
- “ “ J. B. McJilton, p. 107.
- “ “ Joseph M. Douglass, pp. 91, 92.

The history of the means taken by appellee Douglass to get the tunnel, as shown by the evidence, is substantially as follows: He first attempted to get it from the Atlantic Consolidated Mining Company by writing to Mr. Green, one of its officers, about it (testimony of Douglass, pp. 91, 92). This was before he bought an interest in the Contact claim. W. H. Stanley, on the 22d day of March, 1890, obtained a lease of the Atlantic Consolidated mine from the company for a term of two years (see Exhibit A to Answer, pp. 23-25). Stanley immediately entered into possession of the mine and its appurtenances, including this tunnel through which he intended to do his work. He found that C. E. Brown had located the Contact claim upon which the mouth of the tunnel was located, and to avoid trouble with Brown he purchased the Contact ground from him (W. H. Stanley's testimony, pp. 93-98; Deed, pp. 46-48).

After Stanley got his lease and bought the Contact claim, appellee Douglass sent one Frank Muhlbeier to Stanley, who represented that he, Muhlbeier, wanted to work the ground under the lease. Stanley on the 16th day of September, 1891, assigned his lease to Muhlbeier, and at the same time conveyed to him an undivided one-half interest in the Contact claim (Record, pp. 44-49).

Douglass employed Muhlbeier to take the assignment and deed in his name for him and paid the consideration for both (testimony of Douglass, p. 77).

As soon as Muhlbeier got the lease and deed he reassigned the lease to Douglass and made him a deed

of the interest in the Contact, and Douglass immediately entered into possession of the tunnel and mine and did work and took out ore under the lease (Stanley's testimony, p. 97; Douglass' testimony, p. 79).

After Douglass obtained possession of the tunnel in the manner mentioned, the appellants Byrnes and Mulville commenced an action of ejectment in the State Court against him to recover possession of the tunnel (J. D. Blackburn's testimony, pp. 68-70).

He then on the 6th day of February, 1893, attempted to get some right to the tunnel in question by making a tunnel location under Section 2323 of the Revised Statutes of the United States (Record pp. 25-28).

The attempted tunnel location describes a tunnel exactly as the one sought to be condemned in these proceedings is described.

Compare description in complaint, pages 5 and 6, with the description in the notice of location, pages 25-28. It must be remembered that the proposed tunnel right commenced on the Contact claim, and ran through it to the Atlantic Consolidated claim, and through it to the Annie claim, and through it to the South End claim, and through it to the Red Jacket claim, and through it to the Clinton claim, and through it to the Goodman claim. Every one of these claims, at the time of the tunnel location, was owned, held and worked in compliance with the laws of the United States, and three of them were held in fee simple under U. S. Patents. No part of the tunnel location ran through vacant or unoccupied ground. Instead of being run to find blind ledges, it had already been

run by the Atlantic Consolidated Mining Company and its grantees 648 feet through its ledge, and when Douglass entered into possession of this tunnel and mine as the tenant of Byrnes and Mulville he commenced to extend the tunnel in the vein in the face of the tunnel, and continued it in the vein the whole distance, requiring the parties with whom he contracted to run the tunnel in the vein the whole way (Douglass' testimony, pp. 83-110).

A tunnel right can only be located upon vacant land (*Roco Co. vs. Enterprise Co.*, 53 Fed., 34). The tunnel was in ore most of the way from the time that Douglass commenced work on it, after he got the lease. The ore and waste rock were broken down together, and carried out together and thrown together in the creek, and the ore was lost forever to the owners. The ore was pay ore, as abundantly shown by the testimony.

Thomas P. Mack says, page 51: "Within the ledge
 " there are spots that look like good ore. Some spots
 " would pay to extract and work. In the Annie
 " ground I don't think half of the distance would pay.
 " I don't think half of the distance would pay in the
 " Red Jacket. As to the Clinton, I think possibly
 " half of the distance would pay to extract" (p. 52).
 This witness is speaking of the vein as it appears in
 the tunnel after its construction—after Douglass had
 taken out the ore and thrown it away. This witness
 says: "I don't think any human being can tell what the
 " value of the ore was which was taken out by the ex-
 " cavation of the tunnel" (p. 54).

Mr. Douglass speaks of some ore that was saved at
 the mouth of the tunnel, but this was but four tons

which had been separated from the waste (pp. 79-83). All the rest of the ore was thrown away with the waste.

Testimony of W. S. Cummings, p. 115.

“ G. W. Debus, p. 115.

“ Charles Pollock, p. 115.

“ George Roach, p. 116.

“ Albert S. Purdy, p. 116.

“ W. H. Naileigh, p. 117.

“ R. C. Hunt, p. 130.

“ E. J. Powers, p. 114.

This Court will see from this testimony that the tunnel was run in pay ore. The men employed to run the tunnel by Mr. Douglass worked it at so much a foot. Their object was to make as many feet per day as possible, and they were under no instructions to save ore. The ore if saved at all had to be saved as it was broken from its place.

W. H. Naileigh, one of the miners employed by Douglass, located a placer claim to cover the pay ore taken out of this tunnel and thrown away (p. 125). After the tunnel had been run through the Annie, Red Jacket and Clinton claims pay ore was taken from the bottom, top and sides of this tunnel by the owners of these claims and worked at a profit.

Debus testified that the ore from the Annie claim was worth \$35 or \$40 per ton; that from the Red Jacket, \$60 to \$90 a ton. The assays from the Clinton ran from \$130 to \$289 a ton. Forty tons from the ledge paid \$1,254. Purdy testifies there was 63 tons of \$22.50, 40 tons of \$31.25, and 13 tons of \$60 rock

taken from the tunnel from the Red Jacket, Annie and Clinton claims. W. H. Naileigh says: "I don't think " there was over \$1,000 to \$1,500 worth of ore thrown " in the creek from the Red Jacket and Clinton " claims " (p. 127).

Against all this positive, direct, conclusive testimony there was nothing whatever before the Commissioners except expert testimony based upon examinations, and very imperfect ones, after the tunnel had been constructed and all the ore taken out in the excavation thrown away. There was no conflict in the testimony as to the value of the ore while the tunnel was being run, nor as to the value of that taken out immediately from the top, bottom and sides of the tunnel after it was run. Neither Commissioners nor Courts can take expert testimony—mere opinions of witnesses—against undisputed facts; much less can they do so when the expert testimony is based upon imperfect or defective examinations.

The best evidence—the ore itself—was destroyed by the party against whom this positive testimony is given. The witnesses who examined the ledge to testify on the part of petitioners did so in a very superficial and imperfect manner. Samples were taken at every ten steps, and these samples assayed. It scarcely requires argument to show that such samples could not and did not furnish an average of the ledge itself.

All these wrongs were perpetrated by the appellant Douglass under the authority of the right of possession of this tunnel, given him in these proceedings. The

petitioners have not only taken appellants' property for their own private use, under cover of a beneficent statute, but under the same cover they have, in exercising the authority given them, wantonly destroyed the very substance of appellants' estates, without any compensation. Appellees do not intend and never intended to use the tunnel and right of way for any other than their own private purposes, to the exclusion of appellants from their own property, acquired by them under the authority of the mining laws of the United States (see testimony of J. M. Douglass, pp. 110, 111). The Commissioners give to appellees the exclusive use of the whole right of way (see Second, p. 32).

I.

The court below erred as set forth in the first assignment of error.

The tunnel was at the time of the commencement of these proceedings already used by appellants Byrnes and Mulville and their tenant for mining purposes, and said tunnel was not under the provisions of said Act of the Legislature subject to condemnation for the use of appellees, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose.

The proceedings to condemn the tunnel were not authorized by the act which was invoked in aid of appellees, after the commencement of this action. The tunnel was already devoted to the public use designated

by the statute. The Legislature did not intend that a mining construction, owned by one person, should be taken away and given to another to use for the same purpose. Such a construction destroys the very purpose of the act. No such power is expressly given, and, without express provision, such power does not exist.

Matter of N. Y. L. & W. R. Co., 99 N. Y., 23.

Citing :

B. & A. R. R. Co., 53 N. Y., 574.

N. Y. C. & H. R. Co., 63 N. Y., 326.

Rochester Water Comm., 66 N. Y., 413.

City of Buffalo, 68 N. Y., 163.

P. P. & C. I. R. Co. vs. Williamson, 91 N. Y.,
552.

O. C. R. R. Co. vs. Bailey, 3 Oregon, 175.

C. C. R. Co. vs. Moss, 23 Cal., 335.

S. F. & A. W. Co. vs. A. W. Co., 36 Cal., 647,
648.

N. J. & S. R. R. Co. vs. L. B. Comm., 39 N. J.
L., 36.

Bridgeport vs. R. R. Co., 36 Conn., 255.

Davis vs. Nichols, 39 Ill. App., 620.

S. R. T. Co. vs. City, 123 N. Y., 513.

Housatonic etc. R. R. vs. Lee etc., 118 Mass., 391.

B. & M. R. Co. vs. L. & L. R. Co., 124 Mass.,
386.

B. O. & C. R. R. Co. vs. North, 103 Ind., 486.

Mills Em. Dom., Secs. 16, 17.

Pasadena vs. Scimmon, 91 Cal., 218.

“Such authority cannot be implied from a grant of power to condemn, made in general terms. Express legislative authority is requisite, and this authority must be in clear and express terms, or by necessary implication, leaving no uncertainty as to the intent.”

Mills Em. Dom., Sec. 46.

And the use must be a different use from the old.

L. S. R. Y. vs. Chicago etc., 97 Ills., 506.

Peoria Ry. Co. vs. Peoria etc., 105 Ills., 110.

Chicago Ry. vs. Chicago etc. R. R., 112 Ills., 589.

N. C. R. R. vs. C. C. R. R., 83 N. C., 489.

Springfield vs. C. R. R. Co., 4 Cush., 63, 71.

In re Road vs. S. Town, 91 Pa. St., 260.

Valparaiso vs. G. T. R. Co., 24 N. E., 249 (Ind.).

Seymore vs. J. etc. Ry. Co., 26 N. E. Rep., 188 (Ind.).

A. V. R. R. Co. vs. P. J. R. Co., 122 Pa. St., 511.

Appeal Sharon Ry. Co., 122 Pa. St., 533.

U. N. etc. Co. vs. N. D. etc. Co., 18 Atl. Rep., 574 (N. J.).

Anniston vs. Jacksonville, 82 Ala., 300.

M. E. R. Co. vs. Newark, 2 Stockt., 361.

Little Miami vs. Dayton, 23 Ohio St., 510.

P. R. Co's Appeal, 93 Pa. St., 150.

State vs. Montclair, 35 N. J. L., 330, 331.

Douglass could not, while tenant of the appellants Byrnes and Mulville, acquire any title to any of the property he held under the lease. Whatever adverse titles, including the interest in the Contact claim, he

acquired during his tenancy, he could only hold as trustee for appellants.

Rector vs. Gibbon, 111 U. S., 276.

Byrnes vs. Douglass, 44 Pacific Reporter, not published.

The tunnel was a part of the mine itself.

Book vs. Justice M. Co., 58 Fed. R., 117; Sec. 2324 Revised Statutes U. S.

The patent conveyed the tunnel by necessary implication.

Appellants Byrnes and Douglass were entitled to compensation for that part of the tunnel outside the claim the same as for that within it, yet they were awarded nothing for the parts outside.

II.

The court below erred as set forth in the second assignment of error.

The Commissioners, by their report, decided that H. C. Biggs and Maggie Lee McMillan are the owners of an undivided one-fourth interest in the Contact claim and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary of the Contact claim, and said Commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation for said tunnel through the Contact claim or for the right of way through said claim. This tunnel was through solid blasting rock the whole distance, and cost at least ten dollars per foot to construct (testimony of R. Lamb, p. 112; E. T. Powers, p. 112).

The smallest cost of the tunnel testified to by any one was by W. H. Naileigh, who makes it \$5 per foot, which would make for the 299 feet \$1,495.

III.

The court below erred as set forth in the third assignment of error. The Commissioners decided and found that H. C. Biggs and Maggie Lee McMillan are owners of the Annie and Clinton claims, and that the Red Jacket Company is the owner of the Red Jacket claim, and that the petitioners are entitled to the right of way for the tunnel through each of said mines, and no compensation was awarded the said owners or either of them for said right of way.

IV.

The court below erred as set forth in the fourth specification of error.

The evidence showed that while Douglass was in possession of the tunnel in question as tenant of appellants Byrnes and Mulville he purchased an undivided interest equal to one-half of the Contact claim at the same time that he became such tenant and took possession of the property leased, together with said tunnel. The interest so purchased Douglass could only hold in trust for appellants Byrnes and Mulville, and the Commissioners should have awarded compensation to appellants Byrnes and Mulville for the right of way and tunnel through the Contact claim which the evidence shows were of the value of \$2,990. The lowest cost of this tunnel fixed by any one was \$1,495.

V.

The court below erred as set forth in the fifth specification of error.

The Commissioners found that the appellants Byrnes and Mulville were entitled to no compensation for the completed tunnel 648 feet in length outside of that part through the Atlantic Consolidated claim, for which they assessed the damages at \$1,021, while the evidence shows that the whole of said tunnel was worth at the very lowest estimate placed thereon by any witness \$5 per foot for the first 299 feet, and \$4 per foot for 349, which would make \$2,891 instead of \$1,021.

VI.

The court below erred as set forth in specification sixth.

The Commissioners awarded no compensation whatever for the damages sustained by the appellants H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company, for the ores taken out by the appellee Douglass, in extending the tunnel through the Annie, Clinton and Red Jacket claims, which ore was broken down with the waste rock and dumped together in the creek, and forever lost to appellants. The evidence as already set forth shows the value and character of the ores so taken and thrown away.

The findings and report of the Commissioners must have been based upon a misapprehension of the testimony and an erroneous view of the legal rights of the owners of the property taken.

Neither the Constitution of the State of Nevada nor the statutes of that State permit any real or imaginary advantages or benefits to the owners resulting from the taking of their property to be offset against the compensation required to be made.

Section 8, Article 1, of the Constitution of Nevada provides that private property shall not be taken for public use without *just* compensation having been first made or secured.

The statutes of the State require the Commissioners to ascertain and assess the compensation to be paid for private property so taken. The compensation so to be awarded is not the mere market value of the land taken.

V. & T. R. R. Co. vs. Henry, 8 Nevada, 165.

The alleged benefit to appellants, testified to by some of the witnesses, is the increase claimed to have been caused in the value of the mining claims by the development of a vein of pay ore. This claim is inconsistent with the finding of the Commissioners, that no pay ore was found or destroyed, but this benefit is neither direct nor peculiar, but a general one, which would have resulted from the developments of this very vein, which appellants owned, and which they discovered before any location was made. This vein was exposed on the face of the tunnel before appellee ever put a pick into it.

Mills on Eminent Domain, Chapter XV, Secs.

149-154.

Lewis on Eminent Domain, Secs. 467-471.

The courts of Maryland, Nebraska, Virginia, West Virginia and Wisconsin hold that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.

Lewis on Eminent Domain, Sec. 407.

The courts of Georgia, Kentucky, Louisiana and Texas hold that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.

Ib., 468.

Those of Connecticut, Kansas, Maine, Minnesota, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Vermont hold that special benefits only may be set off against both the value of the part taken and damages to the remainder.

Ib., Sec. 469.

The courts of Alabama, California, Delaware, Illinois, Indiana, New York, Ohio, Oregon and South Carolina hold that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken.

Lewis on Eminent Domain, Sec. 470.

The author of the last work on eminent domain lays down the rule that when a part of a tract is taken the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon what remains.

Apply this rule to the facts of this case. Here a completed tunnel 648 feet in length just as essential to the use (which was the same as that for which it was taken) of the owners was taken from the owners, and the owners excluded from it and no compensation allowed them for any part of the completed tunnel except that within the boundary lines of the Atlantic claim. More than two-thirds of this tunnel was taken without any compensation being awarded the owners for it. It cannot be pretended that any ore was developed by appellee in this completed tunnel, for nothing was done on this except to repair it, and the owners were absolutely excluded from any use of this tunnel.

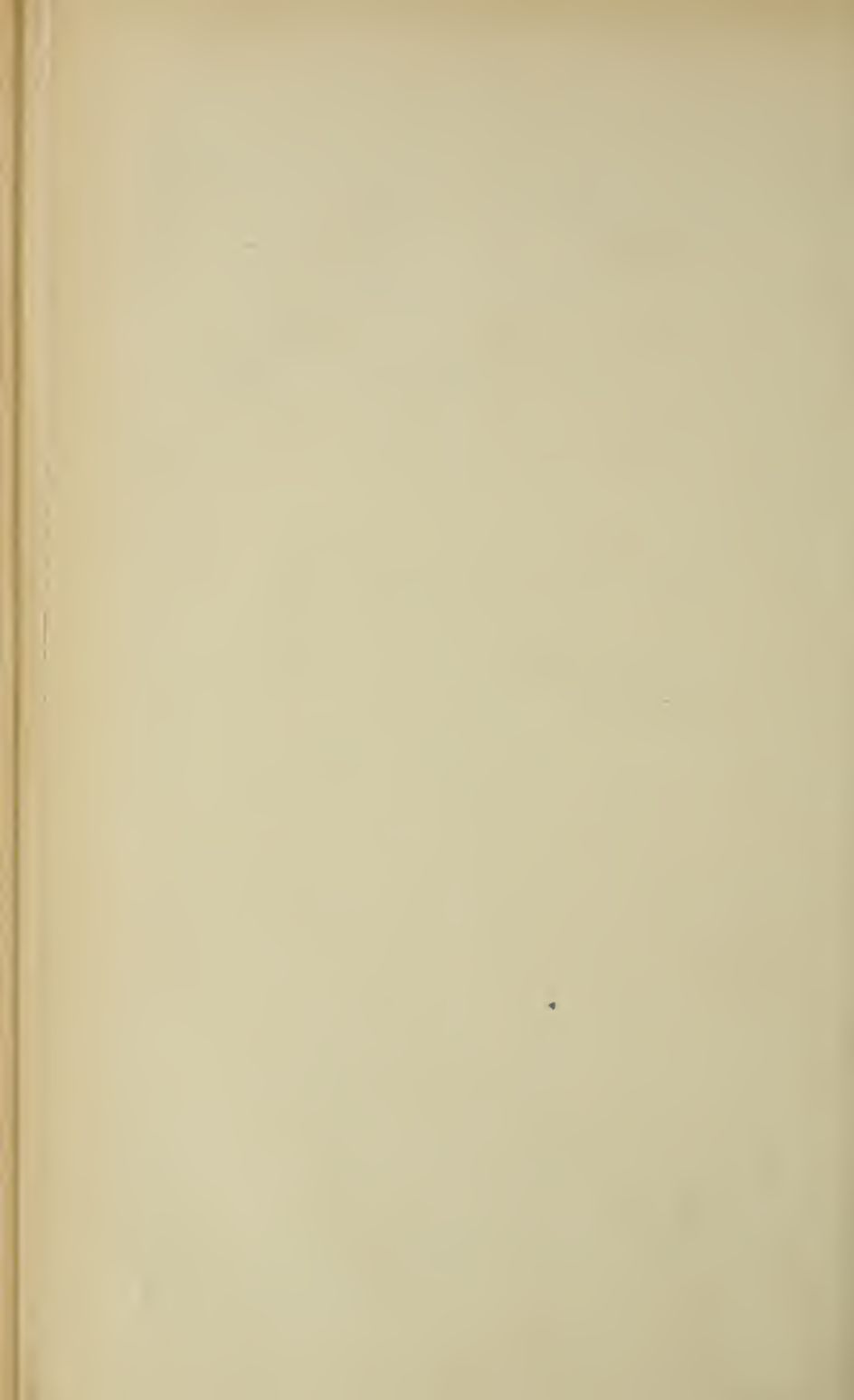
So much for the manner in which that part of the tract was taken, and the purpose for which it was taken, nor can it be pretended that the effect upon what remained benefited the owners, as by this taking they were prevented from working their mines by the most convenient means they had or could have.

As to the remainder of the right of way through the Annie, Red Jacket and Clinton claims, the same may be said except that the tunnel had to be run, but the evidence shows that the tunnel was run in pay ore in the vein located and owned by the other appellants. And the ore broken was down with the waste and thrown away, and when these owners ask for compensation for the right of way taken from them and for the damages done in the taking, they are answered by the report of the Commissioners that they are entitled to nothing, because appellees developed the vein, which they discovered, located and owned.

Appellants respectfully ask that the decree be reversed, with such directions as may be proper under the facts and circumstances of this case.

Respectfully submitted,

W. E. F. DEAL,
Attorney for Appellants.



No. 284.

OF THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES D. BYRNES, et al.

Appellants.

vs.

J. M. DOUGLASS, et al.

Appellees.

BRIEF ON BEHALF OF APPELLEES.

Filed this _____ day of _____ 1914.

Filed

F. M. HUFFAKER,

Solicitor for appellees.

FILED



*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

JAMES D. BYRNES, et. al.

Appellants.

vs.

J. M. DOUGLASS, et. al.,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

May it please the Court :

This proceeding was commenced by Appellees in the District Court of the State of Nevada under a statute thereof entitled, "An Act to Encourage the Mining, Milling, Smelting or Other Reduction of Ores in the State of Nevada," approved March 1, 1875 (Statutes of Nevada, 1875, III, Gen. Stat. Nev., Sec's 256-273), to condemn a right of way for a mining tunnel seven and one-half feet wide by seven and one-half feet high from the Contact mine through five intervening mining claims and locations to wit: The Atlantic, Annie, Red Jacket, South End and Clinton, to the Goodman mine, and to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel.

Subsequently the appellants removed said proceedings into the Circuit Court of the United States, Ninth Circuit, District of Nevada, wherein such proceeding were had pursuant to said statute that said right of way was

the appellee took possession of it under his purchase of an interest in the Contact ground whereon is the mouth of the tunnel. At page 78. Trans., Douglass testifies; "There was a tunnel there that was badly caved down and in very bad shape. * * * It was of no use in the world to any of the mining claims for the purpose of working them, etc." And W. H. Stanley, an exceedingly willing witness for the appellants, was forced to say on cross examination, at page 98, Trans.:", "No mining man could go in that tunnel for the purpose of working the Atlantic ground without first repairing the tunnel." And this effectually disposes of all that Stanley implies in testifying to what he did under his lease of the Atlantic mine with reference to that part of this tunnel on the Contact claim, so that the conclusion of the trial Court that this part of the tunnel had fallen into decay and ruin by non user is fully sustained by the evidence, and being thus, it was clearly subject to appropriation under the rights of Eminent Domain, conferred by said statute, which has been sustained by the Supreme Court of the State of Nevada.

Dayton vs. Seawell, 11 Nev., 364.

Overman vs. Corcoran, 15 Nev., 147, in accord with Lewis, on Em. Dom., Section 1, 184, and Mills on Em. Dom, Section 20.

Upon this witness Stanley is appellants reliance to establish the fact that at the time appellee Douglass purchased the Contact mine he was a tenant of Byrnes and Mulville, and Stanley held the Contact ground for Byrnes and Mulville, for the reason, solely, that Stanley, while holding a lease from the Atlantic Consolidated

appropriated to the use of appellees, (Transcript, p. 41.)

To review this judgment of the Circuit Court, appellants appeal to this Court by a "Bill of Exceptions and Statement." Transcript 42-136.

The first objection of appellants (Trans, 42-3) is that the evidence showed that a part of this right of way sought to be condemned consisted of a tunnel which was owned by James D. Byrnes and Edward Mulville; that J. M. Douglass was, when the proceedings were commenced, in possession of said tunnel as tenant of said Byrnes and Mulville, and that said tunnel was already used by appellants, Byrnes and Mulville, for mining purposes and that it could not be condemned under the said Act of the State of Nevada.

This objection is not well taken as we contend the evidence does not show that appellants were, or had been for many years, using any part of said tunnel, nor that said J. M. Douglass was a tenant of Jas. D. Byrnes and Edward Mulville.

J. F. Angell (Trans. p. 105-6) testified he had lived thirty-three years in Silver City, and knew the tunnel in controversy, and the Contact mines ever since the Fall of 1850 or 1861, (and we here observe that this property is in the Devil's Gate & Chinatown Mining District, Lyon County, Nev.) That in 1865 McGinnis and Buzan worked in this tunnel and ran it for water; that he never saw any work done in this tunnel after 1877. To the same effect is the testimony of J. B. McJilton (Trans 107), and so regarding the testimony of L. S. Lucrouts, (Trans. 71.) and there is no testimony to the contrary. This is borne out by the condition of this part of the tunnel when

Company to the Atlantic mine, a separate and distinct mining location and claim from the Contact, and at the time said lease was made the Atlantic Company, lessor, had no interest in nor made any claim to the Contact mine, and did not attempt to lease the Contact to Stanley, bought the Contact

We contend that a lessee takes what the lease specifies, and nothing else, and if he enters upon other property than that leased his entry is tortious and does not bind the lessor; We also contend that a leasehold estate is separate and distinct from the fee. Therefore the contention of appellants that Byrnes and Mulville, by reason of succeeding to the title of the Atlantic mine through an execution sale in an action of J. D. Blackburn vs. the Atlantic Consolidated Company, succeeded to the leasehold estate therein of W. H. Stanley, is not law.

At the time this lease was given, March 22, 1890, C. E. Brown had not relocated the Contact ground. (Trans., top page 46.) which shows that Brown relocated the Contact ground in July, 1890, three months after Stanley took possession of the Atlantic mine under his lease thereof, and yet he would have us believe, or rather infer from his testimony that when he took this lease he found Brown in possession of the Contact, when it was three months after when Brown relocated the Contact under the laws of Congress, and on the 13th day of June, 1891, (Trans., p. 46.) a year after his lease, Stanley bought the Contact mine from the locator C. E. Brown, for whom? Trans. p. 96-97, Stanley testified, in a suit in the State District Court: "I simply bought him

(Brown) out for myself and for Mr. Millievich," and when Mr. Stanley sold this mine to Mulbeyer he simply sold it for himself. All these transactions we claim show that at that time no one thought of the Atlantic Company having any interest in the contact ground, and under such circumstances, we take it, this Court will not disturb the trial Court and commissioners in their conclusion, when they not only had the opportunity to observe the witness when testifying and his manner, but the opportunity of comparing it with all the other testimony.

Appellee Douglass testifies that the lease of the Atlantic mine had nothing to do with his purchase of the Contact mine; that he took possession of the Contact mine under his purchase, not under the lease, and that at the time he purchased the Contact he did not know the Atlantic Company claimed any interest in it, consequently he is an innocent purchaser for value without notice.

The Atlantic Company at one time owned the Contact ground under the name of the Cadiz, and while owning and possessing it and the Atlantic mine, the Atlantic Company applied for a U. S. patent for the Atlantic mine, but did not include in its application the Cadiz, now Contact ground, and evidently after securing a patent to the Atlantic mine, allowed the Cadiz location to revert to the United States, to be appropriated by the next comer, which was done by Thos. P. Mack, a Surveyor and Civil Engineer and County Recorder of Lyon County. Trans., p. 50.

Appellants, while admitting the Cadiz claim, was lost

to the Atlantic Co., and that T. P. Mack acquired it by his location some six years since, and he failing to do the necessary annual work, C. E. Brown, appellee's predecessor in interest, became the owner of the ground, claim that part of the tunnel on the Contact ground remained the property of the Atlantic Co., as an appurtenant to the Atlantic mine. I cannot see upon what principle or rule of law such a proposition can be maintained.

There is no Statute of the State of Nevada, nor any local regulation, rule or custom of the Devil's Gate and Chinatown Mining District governing tunnels or tunnel rights. Then any such right must depend upon the laws of Congress, which provide: "Where a tunnel is run for the development of a vein or lode for the discovery of mines, the owners of such tunnel shall have the right of possession to all veins, etc. * * *; but, failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right, etc."

Sec. 2323, Rev. Stats., U. S., and the Act of Feb. 11, 1875, amending Sec. 2324, U. S. Rev. Stats, allowed work done in a tunnel, run for the purpose of developing a lode, to be considered for holding purposes as done on the lode. To secure the benefits of this law, tunnel claimants are required to post a notice of the tunnel location and stake out the tunnel course on the surface, and record such notice in the County Recorder's Office. There is no pretense that any of this was ever done by any one, except Appellee Douglass, after he took possession of the Contact mine, hence appellants or the At-

lantic Co. can claim no tunnel, nor did any work in this Contact tunnel for years prior to the purchase by Douglass.

We must bear in mind that this Contact tunnel was not run to develop any lode, or to discover any mine, but as Angell and Lacrouts say, for water. And, as Lacrouts says, was used for furnishing water for Silver City, until the organization of the Gold Hill and Virginia Water Company, when the tunnel occupants sold out to said company; and, as there is nothing in all the records to controvert this, is it not to be taken that whatever tunnel rights the owners had vested in the Gold Hill and Virginia Water Company?

Let us consider another proposition. If an owner of a mine goes outside the boundaries of his claim upon the unappropriated public mineral lands of the United States and starts a tunnel and runs it through unappropriated land into his mine, and afterwards, by non use, allows such tunnel to fall into decay, and while in such condition, another citizen locates a mine under the laws of Congress, taking so much of the tunnel as is on public mineral land, does he not, by virtue of his location, acquire the right to any tunnel, shaft, adit or cut on or in his location? If a man locates a mine and sinks a shaft to a depth of a thousand feet and allows thereafter his claim to become forfeited, and another locates it, does not the shaft go with the claim?

In mining, a tunnel may be said to be a horizontal shaft.

The objection of appellants that we have appropriated to a public use that which has already been appropriated

to the same public use, does not apply. This has reference to an appropriation in the exercise of the rights of Eminent Domain, but appellants do not claim they have any such right, hence are not within the perview of the authorities relied upon by them, but take any view we may, the condemnation of this tunnel right of way through these different mines cannot be questioned.

Mills on Em. Dom., Sections 44, 45, 47; Lewis on Em. Dom., Section 276; Rochester Water Commissioners, 66 N. Y., 413; N. Y. Central R. R. Co. vs. Metropolitan Gas Co., 63 N. Y., 326, Morris and Essex R. R. Co. vs. Central R. R. Co., 31 N. J. L., 213; Peoria, P. and J. R. R. Co. vs. Peoria and S. R. R. Co., 66 Ill., 174;

N. Y. L. and W. Railway Co., 99 N. Y., 113.

The contention of appellants that the Atlantic Company, many years since, went into this water tunnel and for a time worked the Atlantic mine, dedicated this part of the tunnel on the Contact ground to the public use of mining mentioned in the said Statute, is not in accord with fact or law, for whatever may have been the rights of said Company, while in the actual use and occupation of this tunnel, the moment the Company ceased such use, such rights were lost, and as Angell says, Trans. 106: "I don't think Yule done anything in the old tunnel in 1887. Yule came there about that time, * * *, went Below and came back and went to work running a new tunnel. He said when he came back that his business Below was to consult the Company about its being better to run a new tunnel than to clean out the old one, and when he came back he went to work running a new tunnel, and did not

work in the old tunnel. I never saw any work done in the old tunnel after the time Matt Canavan put men to work in there to secure the ground in 1877." This conclusively negatives any right of appellants now to claim this Contact part of the tunnel, either as an appurtenant to the Atlantic mine, or as used by them for working said mine, for it clearly appearing that the Atlantic Company abandoned so much of this tunnel as is on the Contact ground, "the successors of the corporation cannot assert a right to the property, etc."

Randolph on Em. Dom., latter part of Section 216, also Sec. 219 shows there cannot be a public use of property except through condemnation proceedings.

II.

The second and third objections to the confirmation of the Commissioners report, Trans., p. 111, may be considered together. These objections are that the Commissioners failed to assess any compensation for the undivided one-fourth of the tunnel on the Contact mine, also for the right of way through the Annie, Red Jacket and Clinton claims.

In considering these objections we must bear in mind the testimony before the Commissioners showed conclusively that there was no value to these claims when Douglass took possession of this tunnel, that whatever value they now have attaches by reason of his having run the tunnel through them, that seven and one-half feet through them are valueless.

On this question T. P. Mack, Trans., 52, testifies: "These several mining claims had no marketable value

in 1890, unless the Red Jacket and the Atlantic had ore that was developed in their former workings, and their value would be entirely speculative according to my idea. I don't think the marketable value of the Atlantic has been changed; I should say the same was worth more today with the tunnel; it is worth more now than it was before the ore was exposed in it, and I would say the same with reference to the Red Jacket and Clinton. A mine is usually considered more valuable, and you can sell it to a better advantage, if you can go and show ore in it that will pay. It is my judgment that the running of that tunnel has benefited those mines * * *. When the tunnel was half way through the Annie, the land was unappropriated and vacant and subject to location by anyone, and it had no marketable value, and I would say the same of the Clinton; the Red Jacket was a mine for a long time and the parties had a perfect title to it. The damage to that mine would be the amount of pay ore taken out. I would pay more for those three claims now than I would before the tunnel was excavated through them. I can see no damage can result to the Annie by the appropriation of $7\frac{1}{2}$ feet square of ground as a right of way for the tunnel, or to the Jacket or Clinton."

J. D. Blackburn, Trans., 61: "Leaving the question of ore taken out by the excavation of the tunnel, it is worth nothing for right of way through the claims through which the tunnel runs seven and one half feet square. If I was interested in those mines through which the tunnel runs, I would say it done me good to run the tunnel if they found anything, and if they found nothing it could do me no harm, because there is noth-

ing there, and it might save me money trying to find out something myself. The tunnel run through these was an advantage to those mines, because it developed their property without expense to the owners. The running of the tunnel was worth to the owners of the mines through which it ran about ten times what the value of the ore taken out by the tunnel was. There was nothing there to take out to amount to anything," and to the same effect at pages 66-67.

F. S. Lacroux, Trans., 71. "Since the tunnel has been run they have been in there and took some ore out, and the value of those mines is better than before the tunnel was run. I think the tunnel cost more than the rock was worth that was taken out. The tunnel adds more to the value of the mines through which it runs than the ore taken out in running the tunnel," and on page 72; "I think the benefit derived by these claims from the running of the tunnel is more and of greater value than all the value of the ore that may have been taken out by the running of the tunnel."

J. M. Douglass, Trans., 79. "In my view, prior to Sept. 1891, the mining claims on the line of this tunnel as mining properties had no value whatever."

R. C. Hunt, Trans., 130: "I would not fix any value for the $7\frac{1}{2}$ feet square of ground through the Annie, or the Clinton or the Red Jacket for the right of way of the tunnel; I don't think it is of any value."

I submit this is the evidence upon this question upon which the Commissioners had to act. That the testimony of Lamb, Powers, Purdy, Biggs and others for the appellants does not controvert this. That the Commis.

sioners knowing all the witnesses, hearing their testimony, being themselves mining men and examining, under the Statute, the property in question, fully complied with their obligation in reporting as they did.

The attempt of appellants to prove to the Commissioners the value of the right of way was by such testimony as counsel called for, as given by Mr. Lamb, Trans., 112, to the effect that in his opinion it would cost \$3,000 to run the first 250 feet of the tunnel and \$1,600 to run the rest of the tunnel.

E. T. Powers, same page, says it would cost \$3,000 to run the first 350 feet of the tunnel, and \$1,500 to run the rest of the tunnel, and yet they complain because the Commissioners did not find this $7\frac{1}{2}$ feet of these claims of some money value.

That cost is not an element of value, for compensation in condemnation proceedings we refer to

New York W. and S. R. R., 37 Hun., 317.

Mifflin Bringe vs. Juniata County, 144 Pa., 36.

San Antonio and A. R. vs. Ruby, 80 Tex., 172; referred to in Sec. 235, Randolph on Em. Dom. In Sec. 8 of Art. 1 of the Constitution of Nevada, it is said, "Nor shall private property be taken for public use without just compensation having been first made or secured." Under this, appellants contend, that in appropriating property in Nevada, under the right of Eminent Domain, the Commissioners must find some money value, although, in fact, there may be no value proved, or the evidence before them may conclusively show there is no money compensatory value. While in Section 223, Randolph on Em. Dom., it is said: "The word 'just,

full,' 'adequate,' 'due,' or reasonable prefixed to 'compensation' in Constitution or Statute does not carry any definite weight." The Supreme Court of Nevada in *V. and T. R. R. Co. vs. Henry*, 8, 173, says the word 'just' in Nevada's Constitution is used to intensify 'compensation,' "to convey (the Court say) the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample." so the Supreme Court of Nevada, have evidently settled the rule in that State, to be, whenever there is an "equivalent," full and ample rendered the owner by the taking, this is compensation, whether that equivalent be money, or other thing, and this is clear from what the Court in the same case again say, in commenting on evidence of value, to wit: "This was based upon or approximated the basis of the rule, which is clearly summed up by the text writers thus: 'It has been said the appraisers are not to go into conjectural and speculative estimates of consequential damages, but confine themselves to estimating the value of the land taken to the owner. This is most readily and fairly ascertained by determining the value of the whole land without the railway, and of the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled.'" And as to how the Commissioners are to arrive at this, the Court in referring to the conflicting testimony in that case, where the witness made various estimates of compensation, fourteen, thirteen and four hundred dollars, and the Commissioners found one thousand, say: "There was a conflict, but no such conflict as of itself would warrant a District Court in setting aside the verdict of a jury because

against the weight of evidence. It must be remembered that these Commissioners are not on question of fact confined and limited as a jury. They hear and weigh the allegations of the parties; they view the premises, and are supposed to exercise their own judgment to some extent irrespective of evidence; and into their conclusions enter elements or calculation which it is hard to estimate, but which are of sufficient importance to deter a District Court, even in absence of Statutory prohibition, from lightly setting aside a report so made. Under the Statute, it can only be done "upon good cause shown therefor." What that good cause shall be can with safety be held something clear and indubitable, pointing error in law or fact, or both, intentional or unintentional on the part of the Commissioners.

Piper's Appeal, 32 Cal., 530; St. Louis and St. Joseph R. R. Co. vs Richardson, 45 Mo., 466." Again, "As this Court said in another case and iterates now, which affirmance it is hoped may be regarded as a settlement of the question: "If it be admitted that the testimony reported in the record preponderates against the conclusion of the Commissioners on this point, it cannot be said in any view that may be taken of it, that the preponderance is so great and decided as to justify an interference with the report. There is testimony, decided and substantial, in support of it, and furthermore, under the Statute the Commissioners are required to examine and view the land for themselves' which was done in this case; and thus their opinion of its value is added to the testimony of the witnesses on behalf of the respondent. Under such circumstances the decision of the

Commissioners will not be set aside, if there be any substantial testimony to support it. Such is the rule repeatedly, and we think, uniformly followed. * * *. This case very clearly comes within this rule, and hence the report can not be disturbed. The Virginia and Truckee R. R. Co. vs. Elliot, 5 Nev., 358."

This is the law of Nevada, under which the Commissioners in the case at bar acted.

That there is evidence, abundant, substantial and convincing in favor of the report herein appealed from, there can be no question. Angell, Lacrouts, Neligh, Mack, Hunt and Douglass all testified that at the time, and long prior thereto, when appellees ran this tunnel, none of these claims had any value, and it must be borne in mind that these are all well acquainted with this kind of property and its value, to which must be added the opinion of the Commissioners, under the Statute, for they report they examined this tunnel, consequently their conclusion is from their own investigation and all the testimony before them, which showing that these claims have no market value, as a whole, and that when this $7\frac{1}{2}$ feet for this tunnel were taken by these appellees the construction of the tunnel gave each claim a substantial value it never before had, and that the mine, as a mine, is to the owner more valuable than before, and the tunnel cannot possibly damage any of these claims, can it be said, as matter of law, that the Commissioners report is wrong?

I take it this Court will consider the construction the Nevada Supreme Court places upon its Constitution and Statute concerning this question.

By what other rule were the Commissioners to be

governed? When their own Supreme Court in *V. & T. R. R. vs. Henry*, *Supra*, had said, compensation is an equivalent, not merely market value, although when applicable the general rule, where part of a tract is taken the measure of compensation is the depreciation in the market value of the whole tract by reason of the taking, but if there is no depreciation, but a decided enhancement, and the owner is in no respect damaged another rule governs; the equivalent, or as is said in *Selma, R. and D. R. R. Co. vs. Keith*, 53 Ga., 178: "In a case like the present, where under the evidence given in the cause, the actual damages proved is to land taken for railroad purposes, and as the road is located over the farm of the plaintiff, when you come to consider the actual damages and also to inquire into the attendant advantages and disadvantages, a proper rule for your government is thus laid down by our Supreme Court in the case of *Railroad Co. vs. Heister*, 8 Barr., 450: "A fair and just comparison of the value of the tract through which the road passes before and after the improvement is made,—is the property benefitted or injured by the improvement"—is a most material inquiry. If benefitted, the owner neither is, nor ought to be entitled to recover any compensation whatever; if really injured (not a mere fanciful injury) and we add, not a mere supposed injury dependent upon a contingency or uncertainty, as already explained to you, compensation is to be given to the amount of the injury sustained by the owner. In coming to your conclusion you may properly inquire what the property would sell for before and after the improvement, etc." This was in the

charge of the trial Court to the jury, and sustained on appeal. True, these are railroad cases, but the principle applies with greater force to mining tunnels, for it is common knowledge in mining communities that a tunnel through a mining claim is always beneficial, and the great difficulty is to get tunnels run, as it requires money to run a mining tunnel. The foregoing also answers appellants fourth objection to the confirmation of said Commissioners report. The fifth objection, Trans., 112-112, is that the Commissioners assessed the value of the old tunnel through the Atlantic ground at \$1,021.95, and appellants say, "Being 394 feet in length. This is misleading, as the distance is 265 feet. (Trans., 32. So that this finding of the Commissioners can not be interfered with.

III.

The sixth objection, Trans., 113, is; "That no compensation is awarded by the Commissioners for the damages, * * *, by the wrongful acts" of appellants "in running the tunnel through the ledge in the right of way condemned, * * *, and in taking out the ore excavated in running the tunnel, and throwing it away instead of saving it for the owners thereof."

We first observe, that there was no wrongful act in running the tunnel, also, that the evidence shows there was no ore of value thrown away or wasted.

If it be conceded, as it must in this case, that in September, 1891, when Douglas commenced extending this tunnel, the Annie and Clinton claims were public, unlocated mineral land, and no ore bearing vein or lode

was known in any of the claims through which the tunnel ran. The most that under any circumstances could be claimed is, had Mr. Douglass found any pay ore within the excavation thereof he should have saved it for the owner of the mine wherein found, not that there would be any wrong in taking out any ore encountered. And in this proceeding all the Commissioners were concerned with was to ascertain whether he had taken out any pay ore: if so, of what value and what he did with it. If he took out any and preserved it for the owner, under this objection the report of the Commissioners is correct. What evidence had the Commissioners on this question? W. H. Neligh, who ran this tunnel, a practical miner, testified, Trans., 118' et. sequa., that Mr. Douglass's instructions were to save all ore encountered worth saving, and that it was done. That throughout the length of the tunnel there was vein matter with a seam of pay ore in it, that is in spots' not continuous, that they found none on the Annie claim, and after minutely explaining everything near bottom of page 119, says: "The ore from the Red Jacket was dumped at the mouth of the tunnel on the side of the track, and most of it is there yet."

J. D. Blackburn, F. S. Lacrouts, J. F. Angell and E. D. Boyle, all mining men, testified that the ore encountered in the tunnel would not pay to mine. Trans., 117, Mr. Douglass testified he never directed any ore that would pay should be thrown away, also that the pay ore found in the Red Jacket is at the mouth of the tunnel for the owner, and when the Commissioners' also mining men, examined the premises they found this

testimony true, and for themselves saw that the Red Jacket ore was there, notwithstanding some witness pretended to say to the contrary, but in such a case, can the Court say the Commissioners were wrong? Certainly not, when appellants witness could give no satisfactory reason for the statement, nor did they show an intimate knowledge of the matter inquired about, as appears from their statements.

What is pay ore? Mr. Neleigh, Trans., 129, says: "When I say pay ore, I mean such ore as will yield a profit above the cost of mining and milling:" nor is this definition controverted, and when all the mining men who are competent to express an opinion, say such ore was not found within the tunnel, except in the Red Jacket, and that was saved, who is to say they are all wrong?

Let us examine such testimony for appellants as given by G. W. Debus, Trans., 112, where he says the value of the ore taken by the tunnel in the Annie is from \$35 to \$40 per ton, Red Jacket, \$60 to \$90; Clinton, \$130 to \$180 per ton. He was not there when the tunnel was run through the Annie consequently knew nothing about it; and as Hunt says, the ore was taken from the Clinton after the tunnel had been run, giving them an opportunity to get into the Clinton and take the ore, outside the tunnel limits, which they could not otherwise have done, as Neleigh says, without running a tunnel or sinking a shaft themselves. The Commissioners knew all the witnesses and how to estimate their testimony.

These are the exceptions upon which appellants rely for a reversal of this proceeding, which taken together

or singly, in view of the evidence, fail to show any reversible error.

IV.

There is no intimation in all the record that there was any ore taken out by those who formerly ran this tunnel the distance where Douglass found it in 1891, and the fact that the tunnel had been allowed to go to ruin and become utterly useless is proof positive there was nothing to lead any one to think in extending this tunnel ore would be encountered, but it was, in small bunches, and at such distances apart, that as an ore proposition it was valueless. This is clear from the testimony.

Let us assume that the evidence of appellants, that the remainder of each one of these claims is damaged by this tunnel right of way, equal to the value of the ore taken out in excavating the tunnel, by reason of the quantity of ore therein being that much less, then it would have devolved upon the Commissioners in estimating the compensation for the ore thus taken to consider as an offset to such value, those benefits peculiar to the residue of the claims, by reason of the tunnel, even though such benefit should amount to a sum sufficient to cancel the whole compensation.

San Francisco A. and S. R. R. Co. vs. Caldwell, 31 Cal., 367; Nichols vs. City of Bridgeport, 23 Conn., 189; Jones vs. Wells Valley R. R., 30 Ga., 43; Nicholson vs. N. Y. and N. H. R. R. Co., 56 A. Dec., 390; St. Louis J. and S. R. Co. vs. Kirby, 104 Ill., 345; Trinity College vs. Hartford, 32 Conn., 452; Gueis vs. Storn Mt. Grant Ry., 72 Ga., 320; Atlanta vs. Green, 67 Ga., 386; Elgin vs. Paton, 83 Ill., 535; Page vs. Chicago, Mn. and St.

Paul R. R., 70 Ill., 324; Ind. R. R. vs. Hunter, 8 Ind., 74; Witeman vs. Boston and N. R. R., 85 Mass., 133; Conn. vs. Middlesex, 9 Mass., 388, Winona and St. P. R. R. Co. vs. Waldron, 11 Minn., 575; Jackson vs. Waldo, 35 Mo., 637; Livingstone vs. Mayor of N. Y., 8 Wend., 85; Platt vs. Penn. Co., 43 Ohio State, 228; Putnam vs. Douglass Co., 6 Or., 328; Livermors vs. Jamaica, 23 Vt. 361.

This being the law, in the absence of Constitutional or Statutory requirements otherwise, of which there are none in the State of Nevada, what was the testimony before the Commissioners? Overwhelming; that the benefit to the restdue of each claim is far in excess of all damage to the claim by reason of any ore that possibly could have been within the excavation of the tunnel, or for that matter, any other damage.

The consensus of the testimony is that not one of these claims had any value until after this tunnel had been run, exposing a mineral bearing vein before unknown to the owners, and it is a patent fact that had not Douglass taken possession of that abandoned, neglected, dilapidated and worthless tunnel, reconstructed and extended it, uncovering ore along its line, to this day all their claims would be as they have long been, unnoticed and unexplored.

Is there a single witness who pretends to say, that the ore within the excavation of this tunnel-way is in value equal to the cost of constructing the tunnel? Not one! Could there then be any value for the consideration of the Commisssoners? Certainly not under the well known maxim of miners, that ore is not valuable until it

pays a profit over all cost of obtaining it, including discount on any silver it may contain. And if, as abundantly testified to, all the ore excavated by the tunnel would not pay the cost of constructing it, it is safe to say it would not pay for mining, and it is no answer to this, for appellants to prove what, after Douglass had opened a way for them, they went through his tunnel to their claims and found by running drifts, sinking winzes or making upraises from the tunnel, as testified to. For without this tunnel they never would have done this, for the reason they did not know these claims had any value until after this tunnel was run, as appears from the testimony.

Thos. P. Mack, a witness for appellees, Trans., 54 says: "I don't think the value of all the ore taken out by the excavation of that tunnel would be as great as the increased value of the mines by reason of the ore discovered by the running of the tunnel." And so is the testimony of every one competent to express an intelligent opinion in reference to this question.

The general proposition governing this entire inquiry seems to be well expressed in Section 464, Lewis on Em. Dom., as follows: "When part is taken just compensation includes damages to the remainder—upon this point there is entire unanimity of opinion.

The Constitutional provision can not be carried out in its letter and spirit by anything short of a just compensation for all direct damages to the owner of the lot, confined to that lot. occasioned by the taking of his land. The paramount law intends that such owner, so far as the lot in question is concerned, shall be put in

as good condition pecunarily by a just compensation as he would have been in if that lot of land had remained entire as his own property. How much less is that lot and its erection thereon remaining worth to the owner as property, to be used or leased or sold, the day after the property was taken to be used for the purpose designed than the whole lot intact, was the day before such taking, etc."

In accord with which are:

Haynes vs. City of Duluth, 50 N. W. Rep., 663.

S. F. A. and S. F. R. R. Co. vs. Caldwell, 31 Cal., 368.

V. and T. R. R. Co. vs. Henry, 8 Nev., 165.

Mills on E. n. Dom., Sec. 159.

Randolph on E. n. Dom. Sec. 254.

3 Sutherland on Damages, pages 432-3 and 4.

What could the Commissioners conclude other than they did with the evidence clearly establishing the fact that each one of these claims is worth far more with this tunnel than without it, and all these questions were particularly for the Commissioners to determine, for Section 8 of the Act under which they were appointed, being Section 263, Gen. Stats., Nevada, provides: "The said Commissioners shall proceed to view the several tracts of land, as ordered by said Court or Judge, and shall hear the allegations and proof of said parties, and shall ascertain and assess the compensation for the land sought to be appropriated to be paid by the petitioner, etc."

This certainly does not mean they must find some sum of money, whether there is any money value to the thing appropriated or not?

They are simply to find what the evidence warrants,

always with a view to substantial justice to all parties concerned. The whole proposition cannot be better expressed, than was by the trial Judge in his opinion, page 150, Transcript: "After a careful examination of the evidence it appears to my satisfaction that the appropriation of the right of way for the tunnel through the mining claims of the defendants to the Goodman mine will be of great benefit and advantage to the mining industry of Lyon County, where the claims are situated; that it is necessary to condemn the lands asked for in the petition for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss, damage or inconvenience to the defendants."

Evidently the Commissioners took the same view of the evidence. It must be always borne in mind that this proceeding is under an Act of the Legislature of Nevada entitlee, "An Act to Encourage Mining, Milling, Smelting or Other Reduction of Ores in the State of Nevada," approved March 1, 1872. Statutes 1872, 111, Section 1, (Gen. Stats., Nev., Sec. 256); "The production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."

As before remarked this Statute has been upheld by the Supreme Court of the State of Nevada, also by the

U. S. Circuit Court for that District.

Douglass vs. Byrnes, 59 F., 56.

The "just compensation" of the Constitution always suggests the idea of value, consequently if there is no value to the property, or interest sought to be condemned, and no damage, but only benefit caused by the taking, there can be no compensation required. As the value and damage increase the compensation to the owner would necessarily be enhanced. As the value and damage decrease the compensation would be lessened, and there is no limit in law or reason, outside of evidence, to this decrease in value.

But suppose as to this there is some conflict in the evidence, this was to be reconciled by the Commissioners and the trial Court, and their conclusion, like the verdict of a trial jury, will not be disturbed on appeal.

Ray vs. Cowan, 44. P., 821.

Crosby Lumber Co. vs. Smith, 51, Fed., 63.

It would seem the same rule is applicable in a proceeding of this kind, as in admiralty respecting a report of a commission appointed to ascertain damages, which is to the effect that findings as to questions of fact depending on conflicting evidence should not be disturbed by the Court, unless error or mistake is clearly apparent.

Panama R. Co. vs. Napier Shipping Co. 71 Fed., 408.

And as we claim no error or mistake appears to have been made by the Commissioners or the learned Judge to whom they reported, we most respectfully submit that the Record herein shows no reversible error.

F. M. HUFFAKER,
Solicitor for Appellees.

No. 284.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,
Appellants,

VS.

J. M. DOUGLASS ET AL.,
Appellees.

Appellants' Reply to Brief for Appellees.

W. E. F. DEAL,
Attorney for Appellants.

Filed June

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APPELLANTS' REPLY TO BRIEF FOR APPELLEES.

It is claimed by counsel for appellees (page 2 of his brief) that appellants had not been using any part of the tunnel in question for many years, and that Douglass was not a tenant of appellants Byrnes and Douglass, and that Douglass was an innocent purchaser of the contact claim without notice. A reference to the record will show that these claims are without support in the evidence. J. F. Angell testified, page 106:

Thomas P. Mack located the contact claim before C. E. Brown located it (page 50). He testified as follows (page 59):

“Q. Did you claim that tunnel when you located that ground? Did you claim that you acquired any right to that tunnel when you located this ground. A. No, sir.”

Why was it that Mr. Mack did not claim the tunnel? His testimony shows the reason; he did not construct it, and it was at the time of his location in the possession of the Atlantic Consolidated Company, which constructed it.

J. D. Blackburn was there at the time in possession as watchman for the company, see his testimony, page 63:

“I swore in the District Court that I knew Yule, the superintendent of the Atlantic Consolidated Mining Company, and that he worked the Atlantic claim through the other tunnels and through the lower tunnel too, and it is true. That was in 1878.”

He further testified that he went into possession of the Atlantic Consolidated Mine and this very tunnel as watchman for the Atlantic Consolidated Company on the first day of February, 1887, and was in such possession until he commenced his suit to recover his wages as watchman on September 2, 1890, see his cross-examination, pages 68, 69, 70.

The witness testified that the company did not own this tunnel for the reason that while he was in possession as watchman for the owners a location was made of the land where the mouth and part of the tunnel are situated in which he was interested. He is under

the same delusion as the appellant Douglass, that persons occupying positions of trust, such as watchman and tenants, can acquire interests in the trust property adverse to the owners. Mr. Blackburn further testified, pages 101, 102 :

“ I was the plaintiff in the suit of J. D. Blackburn
 “ against the Atlantic Consolidated Mining Company,
 “ which was tried in the District Court of the State of
 “ Nevada, first judicial district, Storey county, and re-
 “ covered judgment for the amount claimed. Between
 “ October 28, 1887 and September 1, 1890, I performed
 “ certain services for the Atlantic Consolidated Min-
 “ ing Company, as watchman, taking care of their
 “ property. The company had run the lower tunnel.
 “ Bob Buzan worked in it in 1875. When I saw
 “ Buzan working there, the tunnel had been run to
 “ a distance of over three hundred feet, and he run it
 “ along a distance until he cut the ledge. It was
 “ the same named company that I was watchman for
 “ that run the tunnel, but different men became inter-
 “ ested in it. The parties I worked for as watchman
 “ became possessed of the lower tunnel as successors
 “ in interest of the parties who run the tunnel. When
 “ I went there as watchman, the first day of February,
 “ 1887, I took possession of the lower tunnel and
 “ their other property until I commenced suit against
 “ them for my wages, the second day of September,
 “ 1890. I worked for them as foreman and superin-
 “ tendent at first, and worked in that capacity until
 “ they closed the mine, and then I was left in charge
 “ as watchman. I remained as watchman until Sep-
 “ tember 2, 1890.”

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“Q. Did you claim that tunnel when you located that ground? Did you claim that you acquired any right to that tunnel when you located this ground. A. No, sir.”

Why was it that Mr. Mack did not claim the tunnel? His testimony shows the reason; he did not construct it, and it was at the time of his location in the possession of the Atlantic Consolidated Company, which constructed it.

J. D. Blackburn was there at the time in possession as watchman for the company, see his testimony, page 63:

“I swore in the District Court that I knew Yule, the superintendent of the Atlantic Consolidated Mining Company, and that he worked the Atlantic claim through the other tunnels and through the lower tunnel too, and it is true. That was in 1878.”

He further testified that he went into possession of the Atlantic Consolidated Mine and this very tunnel as watchman for the Atlantic Consolidated Company on the first day of February, 1887, and was in such possession until he commenced his suit to recover his wages as watchman on September 2, 1890, see his cross-examination, pages 68, 69, 70.

The witness testified that the company did not own this tunnel for the reason that while he was in possession as watchman for the owners a location was made of the land where the mouth and part of the tunnel are situated in which he was interested. He is under

the same delusion as the appellant Douglass, that persons occupying positions of trust, such as watchman and tenants, can acquire interests in the trust property adverse to the owners. Mr. Blackburn further testified, pages 101, 102 :

“ I was the plaintiff in the suit of J. D. Blackburn
 “ against the Atlantic Consolidated Mining Company,
 “ which was tried in the District Court of the State of
 “ Nevada, first judicial district, Storey county, and re-
 “ covered judgment for the amount claimed. Between
 “ October 28, 1887 and September 1, 1890, I performed
 “ certain services for the Atlantic Consolidated Min-
 “ ing Company, as watchman, taking care of their
 “ property. The company had run the lower tunnel.
 “ Bob Buzan worked in it in 1875. When I saw
 “ Buzan working there, the tunnel had been run to
 “ a distance of over three hundred feet, and he run it
 “ along a distance until he cut the ledge. It was
 “ the same named company that I was watchman for
 “ that run the tunnel, but different men became inter-
 “ ested in it. The parties I worked for as watchman
 “ became possessed of the lower tunnel as successors
 “ in interest of the parties who run the tunnel. When
 “ I went there as watchman, the first day of February,
 “ 1887, I took possession of the lower tunnel and
 “ their other property until I commenced suit against
 “ them for my wages, the second day of September,
 “ 1890. I worked for them as foreman and superin-
 “ tendent at first, and worked in that capacity until
 “ they closed the mine, and then I was left in charge
 “ as watchman. I remained as watchman until Sep-
 “ tember 2, 1890.”

On cross-examination, Mr. Blackburn testified :

“ I didn't do any work as watchman. It was some
 “ years prior to 1890 that work had been done on the
 “ Cadiz ground. I think when Brown located the
 “ Cadiz ground, in 1890, that it was vacant ground
 “ subject to relocation by reason of the fact that no work
 “ had been done for several years. The tunnel was a
 “ good tunnel for about 430 feet in 1890. I measured
 “ it to the point where it was caved at that time
 “ with Brown. The tunnel was run about 300 feet
 “ when I went to Silver city in 1872. I understood
 “ that it had been run by the Atlantic Company. One
 “ of the original locators of the ground told me the
 “ company run it. It was about 1882 when the cor-
 “ poration last done any work on the tunnel.”

The Court will see from the record that Mr. Blackburn was in possession of this very tunnel, together with all property of the Atlantic Consolidated Mining Company, from February, 1887, to September 2, 1890, and that the title of appellants Byrnes and Mulville to the property was by virtue of a judgment secured against the company by Blackburn on the 24th day of June, 1891 (page 43), and execution and sale. The Sheriff's deed to James D. Byrnes and J. J. Grene was made February 16, 1892 (p. 44.) The judgment was rendered for Blackburn's wages as watchman.

On the 22d day of March, 1890, W. H. Stanley entered into possession of the Atlantic Consolidated Mine and this tunnel under the lease marked Exhibit A to answer (pp. 23-25). It will be seen that Stanley took possession while Blackburn was acting as watchman. Stanley testified (pages 95-98): “ I am lessee

“ named in the lease which has been introduced in evi-
 “ dence in this case. Under this lease I took possession
 “ of the ground and of the tunnels. There were three
 “ tunnels leased with the ground. I got the Atlantic and
 “ Cadiz ground. That was in the spring of 1890 (p. 95).
 “ I took possession of the lower tunnel under the lease
 “ which I had of the Atlantic ground and its appurte-
 “ nances. The first thing I did after getting the lease I
 “ took possession of the lower tunnel,—the tunnel in con-
 “ troversy here—as I expected to do the greatest part of
 “ my work through this tunnel (page 96).”

On the 16th day of September, 1891, Stanley assigned his lease to Frank Muhlbeier (pages 44 and 45) and at the same time conveyed his interest in the Contact mine to him which he had acquired from C. E. Brown, to avoid any trouble with Brown and to enjoy the benefit of his lease (pp. 48, 49; Stanley's testimony pages 93 and 94).

Stanley testified (page 97): “ Then Muhlbeier came
 “ to me and represented to me he wanted to work that
 “ ground under that lease. I delivered possession to
 “ Muhlbeier according to the terms of the lease. * *
 “ I put Muhlbeier into possession of the very same
 “ property, * * * and he stepped into my shoes so
 “ far as the lease was concerned.”

As soon as Muhlbeier got the assignment of the lease and the deed from Stanley he assigned the lease and conveyed the Contact ground to appellant Douglass, who took possession under the lease and deed. Stanley's testimony (page 97): “ After Douglass got the assign-
 “ ment and the conveyance from Muhlbeier he opened

“ the mine and extracted ore and extended the lower
 “ tunnel beyond the point where I penetrated.”

See page 45 as to the assignment from Muhlbeier to Douglass; and as to the deed of the contact claim from Muhlbeier to Douglass, see page 49.

On the 16th day of September, 1891, Douglass is in possession of the Contact ground—of the Atlantic mine and of this tunnel, as tenant of the Atlantic Consolidated Mining Company.

He took the titles just as Stanley held them and was bound to know exactly what he got from his assignee. Muhlbeier was the agent of Douglass in making the purchase of the lease and the contract claim. He was employed by Douglass for that very purpose.

Mr. Douglass testified, page 77 :

“ I employed Muhlbeier to buy the Contact and get
 “ the assignment for me. I furnished the money that
 “ was paid for it. I employed Mr. Huffaker to draw the
 “ papers and to attend to the matter for me.”

At the time when Mr. Douglass took this deed and assignment he knew that C. J. Milievich, one of the grantees, in the deed of the Contact ground made by C. E. Brown to Stanley and Milievich (see deed, pages 46, 47 and 48) held the interest in the contract so acquired for Andrew Charles.

Mr. Douglass so testified. He says (p. 77): “ Andrew Charles claimed that the Milievich interest in the
 “ the contact claim was for him.”

Stanley says (p 93): “ Andrew Charles and I owned equal interests in the lease.”

Douglass says (page 79): “ I might have told
 “ Charles before I got the tunnel what I wanted it for,

“and he helped me to get it. I might have said to
“Charles that I wanted it for the purpose of running a
“tunnel in that ground as he owned an interest in the
“Contact. Charles first worked in the Atlantic ground
“under a lease I got from Stanley. * * *
“I took the lease of the Atlantic ground for the reason
“that Charles wanted to work the ground. I didn’t
“want the lease for myself, but I took it myself, and
“told Charles he could have that lease and work the
“ground under it.”

Can there be any possible question under this testi-
mony as to the fact that Douglass did take possession
of this mine and this tunnel under his lease? As
was said by the Supreme Court of Nevada in *Byrnes*
vs. *Douglass*, 42 Pacific Reporter, p. 799: “Whenever
“the mine was conveyed the possession of the tunnel
“went with it.”

When Stanley went into possession of the Atlantic
mine it consisted of the Atlantic and Cadiz mines—
Brown having relocated the Cadiz mine under the
name of the Contact for himself and J. D. Blackburn,
the watchman of the property—it still remained the prop-
erty of the Atlantic Consolidated Company, as neither
Brown nor Blackburn could acquire such a joint or other
title against the company. Stanley and Milievich or
Charles then took title to the Contact from Brown to
enjoy unmolested the lease which Stanley and Charles
owned together, and finally through the conveyances in-
troduced in evidence Douglass and Charles got posses-
sion exactly as Stanley and Charles held the property.

Douglass knew in law whatever his agent knew.
Stanley explained the circumstances in the presence of

Muhlbeier and the attorney for Mr. Douglass. He testified, page 93 :

“ At the time of the assignment of this lease to Muhlbeier, I informed Mr. Huffaker that I owned one-half of that lease and that Andrew Charles owned the other half. I informed him of the same fact at the time of the conveyance of the contact. I expressed a doubt of my right to convey the Contact claim at all, and Mr. Huffaker said I could convey it, and he would stand between me and harm in this respect, and so I conveyed.”

No question of abandonment is in this case. Abandonment cannot take place of property held in fee simple. If the tunnel was part of the mine, title to it could only be transferred by the deed of the owner or by an adverse possession for the statutory time, which raises the presumption of a grant.

Ferris vs. Coover.

Ferris vs. Chapman, 10 Cal., 589.

The Commissioners, in the sixth finding, award appellants Byrnes and Mulville \$1,021.95 for the value of the right of way through the Atlantic Consolidated mine. They could only have done this for the reason that appellants' predecessors in interest and grantors constructed this tunnel through their mine and this was the part of the tunnel that was caved in. All of the witnesses testify that the first two hundred or three hundred feet of the tunnel was in solid rock and that no repairs were necessary to that part of the tunnel.

W. H. Naleigh, page 124: “The first two hundred and fifty feet were repaired for forty cents a foot. The

“repairs that amounted to anything, testified to by Mr. Douglass, were made beyond the first two hundred feet” (see Stanley’s testimony, p. 98).

Appellants Byrnes and Mulville took the title to the Atlantic Consolidated mine, including the tunnels, subject to the lease, and, upon the expiration of the lease, they were entitled to receive the property leased just as it was received by the lessee, wear and reasonable use thereof excepted. This was one of the covenants of the lease. (See lease, page 24.)

McCune vs. Montgomery, 9 Cal., 576.

The rule that a tenant cannot dispute a landlord’s title applies just as fully between the vendee of the landlord and tenant as between the original landlord and tenant.

A. and E. Encyclop. of Law, Vol. 12; Title Landlord and Tenant, pp. 701-707.

Section 2323 and Section 2324 of the Revised Statutes of the United States relate to entirely different matters and not, as counsel for appellee claims, to the same matter. Under Section 2323, a tunnel location can be made for the purpose of discovering of what are known as blind ledges. These tunnel locations can only be made upon vacant public land. After a vein is discovered by means of the tunnel, the locator must locate the vein so discovered as provided in Section 2324.

Rico Aspen Com. Co. vs. Enterprise Co., 53 Fed. R., 322.

Section 2324 as amended by the Act of Feb. 11, 1875, applies to claims that have been discovered, located and

owned. In such cases the act provides that work done in a tunnel run for the purpose of developing such discovered, located and owned lode shall be considered as expended on the lode.

Book vs. Justice Mining Co., 58 Fed. R., 117.

The rule for arriving at the compensation to be paid for land taken under the act in question as stated by counsel for appellees was to this effect: That the market value of the land before the taking should be ascertained and then the market value of what was not taken should then be ascertained, and, if the market value of what was not taken is enhanced by reason of the benefits caused by the taking of a part, the difference is the compensation to be paid. Such a rule will not give the just compensation required by law to be paid. It leaves out of the question entirely the damages sustained by the destruction of buildings, which often takes place, as well as the destruction of growing trees and minerals that may be taken and destroyed in putting to use the right of way.

Virginia and Truckee R. R. Co. vs. Henry, 8 Nev., 171; 34 New Hampshire, 284.

Sutherland on Damages, Vol. III., Secs. 1051 to 1090, Section 1068.

Finn vs. Providence Gas and Water Company, 96 Pa. St., p. 631.

Marsden vs. Cambridge, 114 Mass., 490.

Hartshorn vs. Worcester, 113 Mass., 111.

In this case the appellants were entitled to the full value of the completed tunnel, 648½ feet long, together with all damages they sustained by reason of being deprived of the best means they had of working their own mines, and also the value of all ore destroyed or thrown away in the extension of the tunnel.

- See authorities above cited and *Colusa Co. vs. Hudson*, 85 Cal., 633.

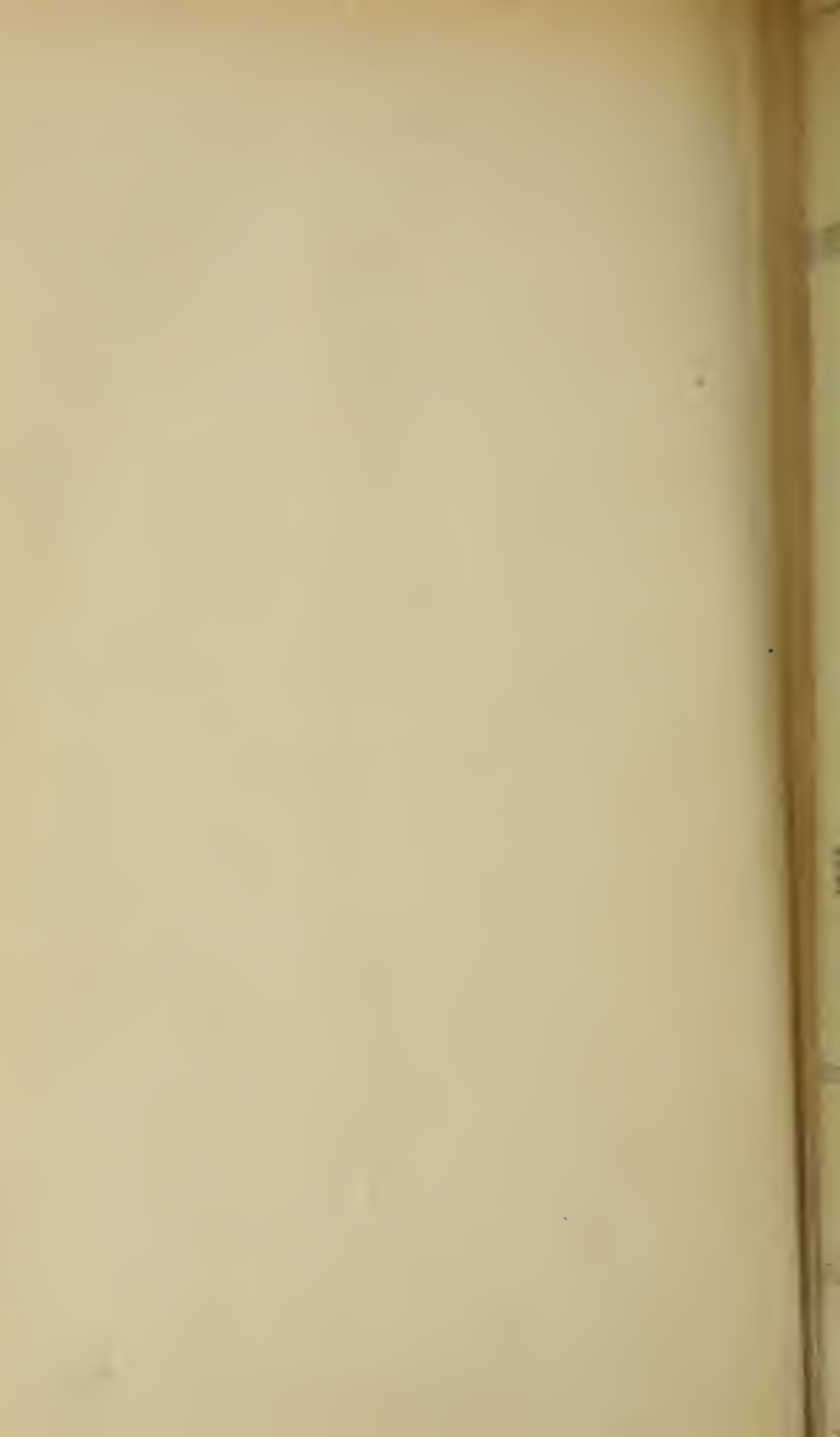
All property has some value. The taking of private property for a public use carries with it the payment of something for the taking, just as the invasion of a private right of itself imports damages.

The other questions involved in this case are not discussed in this brief for the reason that they have been fully presented in the brief on file and in the oral argument.

Respectfully submitted,

W. E. F. DEAL,

Attorney for Appellants.



IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JAMES D. BYRNES ET AL.,

Appellants.

VS.

J. M. DOUGLASS ET AL.,

Appellees.

Petition for Rehearing.

W. E. F. DEAL,

Attorney for Appellants

EDMUND TAUSZKY,

Of Counsel.

Filed October 10, 1907.

Clark



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FOR THE NINTH CIRCUIT.

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Appellants.

VS.

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Appellees.

PETITION FOR REHEARING.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit

The appellants in the above-entitled proceeding respectfully petition for a rehearing thereof.

Your honors have stated in your opinion therein that upon the facts that appear in the record that issue it is unnecessary to consider whether or not a ruling issued which has been questioned and is in error by a ruling responsive thereto, under the statute of Nevada, is void as a matter of law which it is argued and be deemed as the error of another ruling.

The statement of the facts accompanying the opinion is not in accordance with appellants' understanding of the record and we believe a re-examination, upon a re-hearing, will show that from the *16th day of June, 1890*, until these proceedings were commenced, this tunnel was constantly used for mining purposes by the appellee J. M. Douglass, while in possession as tenant of the Atlantic Consolidated Mining Company and their grantors, the appellants James D. Byrnes and Edward Muhlbecker. The mistake which has been made as to the facts, has been caused by a misunderstanding of the order of the transactions with reference to the tunnel and the dates of their occurrence from the time when W. H. Stanley took possession of the tunnel, under his lease from the Atlantic Consolidated Company, to the time when these proceedings were commenced.

W. H. Stanley took possession of the mine and tunnel under his lease *March 22d, 1890* (pp. 23 and 24, p. 95). This lease was for the term of two years, from March 22d, 1890, which would make the lease expire *March 22d, 1892*, and the lease gave Stanley the privilege of an extension for the further period of two years; which extension would have expired on *March 22d, 1894*. Stanley's rental was fixed by the lease at 50 cents per ton for every ton of ore extracted and milled from the property, and the lease provided that at the expiration of the lease, Stanley should quit and surrender the premises to the Atlantic Consolidated Company.

The appellant Douglass corresponded with Mr. Greene, who was one of the officers of the company, with refer-

to this tunnel, but nothing came of this (pp. 91 and 92).

After Stanley took possession, under his lease, he ascertained that C. E. Brown had located the Contact claim, in which the mouth and 299 feet of the tunnel were situated (See report of Commissioners, second p., 32. Notice of location of Contact claim, pp. 45 and 46. Testimony of W. H. Stanley, pp. 93 and 94). Stanley purchased the Contact ground so as to avoid all trouble, as he intended to work the mine through this tunnel. It was for the purpose of enjoying the benefit of his lease that he made this purchase.

The deed of the Contact claim was made to W. H. Stanley and C. H. Millievich, on *June 13th, 1891* (pp. 46-48). The date of Brown's location, as shown in this deed, was *July 7, 1890*, after Stanley took possession under his lease, which was on *March 22d, 1890*.

J. D. Blackburn was watchman for the company, having charge of the mine and tunnel from *Oct. 28, 1887*, to *September 1st, 1890* (pp. 101 and 102, 68, 69 and 70).

J. D. Blackburn was interested in the locations of the Contact claim, made by T. P. Mack and C. E. Brown, while Blackburn was in possession, as watchman, of that claim which was owned by the company under the name of the Cadiz claim.

On the *16th day of June, 1891*, W. H. Stanley, who was then in possession of the Atlantic claim, the Contact claim and the tunnel, as tenant of the Atlantic Consolidated Mining Company, assigned his lease and conveyed his interest in the Contact claim to Mulilbeyer, who had been employed by the appellee J. M. Douglass, for that

purpose, the latter having employed Mr. Huffaker as his attorney to draw the papers and having paid the consideration for the assignment and conveyance. There is no conflict in the evidence as to this (See testimony of W. H. Stanley, p. 94; J. M. Douglass, pp. 90 and 91; F. M. Huffaker, p. 74).

At the same time and as part of the same transaction and for the same consideration Muhlbeier assigned the lease—conveyed the interest in the Contact claim to Douglass (pp. 44 and 45 and 48 and 49). All this was done on *Sept. 16th, 1891*.

Can there be any question that by these transactions J. M. Douglass placed himself in the same position as Stanley, with reference to all this property the Atlantic and Contact claims and this tunnel?

Stanley expressed doubts, at the time of the transactions, as to his right to convey the Contact claim, and only did so upon the assurances of Mr. Douglass' attorney and agent (pp. 94 and 96). When Stanley made the assignment and conveyance to Muhlbeier he put latter into possession of the same property he held, the Atlantic claim, the Contact claim and the tunnel (p. 97).

Mr. Stanley testified that "after Douglass got the assignment and the conveyance from Muhlbeier he operated the mine and extracted ore and extended the lower tunnel beyond the point where he penetrated it" (p. 97).

Mr. Douglass denied that he took possession of the tunnel under the lease. If this were so it would make no difference, as he became the tenant of the company and his agents, Muhlbeier and Charles, took possession by

his direction, and he could not change his relation to the company, except by surrendering the property to it.

Mr. Douglass testified that he and Andrew Charles were working on the Atlantic ground under the lease (p. 77), and that he took the lease for the reason that Charles wanted to work the ground (p. 79), and that Charles measured the work that was done in extending the tunnel (p. 84), and after the appellant James D. Byrnes, failed to get possession of this tunnel, through the refusal of Mr. Douglass' employees to permit him to take possession, he went to see Mr. Douglass about the matter, and Mr. Douglass then produced the lease which had been assigned to him. Mr. Douglass denies having the conversation which Mr. Byrnes testified to, but he does not deny having produced the lease as his justification for refusing to admit Mr. Byrnes into possession.

This tunnel instead of not being used for mining purposes, prior to and up to the time of the commencement of these proceedings, was leased with the mine for the purpose of mining. It was taken possession of by Stanley for the purpose of mining by the use of it with Andrew Charles, who owned one-half of it, of which Mr. Douglass had full notice through his attorney, Mr. Hufaker, and his agent, Muhlbeier, Stanley's assignee (p. 93). Mr. Douglass, through his agent, Muhlbeier, was placed in possession of the same property by Stanley, who told Muhlbeier "he should pay the royalty and conform to the terms of the lease, and he stepped into my shoes so far as that lease was concerned" (p. 97).

Is there any conflict in this testimony, or is there any evidence in the record in conflict with it?

Andrew Charles, who was half owner in the lease with the knowledge of Mr. Douglass and with his consent, continued to work under the lease and acted for Douglass as his agent in measuring the tunnel which Mr. Douglass extended 718.1 feet from its face, which was 648½ feet from its mouth, prior to the 6th day of February, 1893, the date of Mr. Douglass' attempted location, all of which work was done while Mr. Douglass was, under the evidence, the tenant of the owners of the tunnel. Before the proceedings were commenced Mr. Douglass was as much bound to comply with the covenant of the lease to surrender possession of this tunnel, which this Court has decided belonged to the Atlantic mine owned by the appellants Byrnes and Muhlbever, as was Mr. Stanley. The tunnel had been repaired and cleaned out by Mr. Douglass a distance of 648½ feet before these proceedings were commenced. There never was any dispute or question about this. After Mr. Douglass repaired and cleaned out the 648½ feet, and before these proceedings were commenced, and on the 6th day of February, 1893, he attempted to acquire title to the right of way embraced in the 648½ run by the Atlantic Consolidated Mining Company before the making of the lease to Stanley, and the 718.1 feet which Mr. Douglass run after the lease was assigned to him, and before he commenced these proceedings, by making a location of it under Section 2323 of the Revised Statutes of the United States. In his affidavit to his notice of location (p. 27), he swore that he and his predecessors in interest have run the tunnel a distance of 718.1 feet from its *face*, not from its mouth, but from

the point 648½ feet from its mouth. Ore was taken out of this tunnel and deposited for Messrs. Charles and Douglass (p. 118).

Further than this Mr. Douglass set up this location in his amended petition in this proceeding and alleged that he had been engaged in running this tunnel since the 16th day of September, 1891 (pp. 4 and 5). This amended petition was verified Sept. 8, 1893. The effect of the allegation is that from Sept. 16, 1891, to Sept. 8, 1893, he had been engaged in running this tunnel. Appellees admit this allegation in their answer, but deny that it was done without objection by the owners (p. 12).

How can it be said that no use was made of this tunnel for mining purposes when the uncontradicted evidence is that it was run and used by Mr. Douglass himself for mining purposes, as tenant of the owners, up to the time when these proceedings were commenced?

He run it to prospect the Goodman mine, in which he was a stockholder, but he could acquire no title to it without purchasing it from the owners. His legal position was fixed by the lease, which was given for the purpose of working the Atlantic mine for a royalty, to be paid by him to the owners. He could not get title to it from the owners so he got possession, in a secret way, from the tenants of the owners, and became a partner of Andrew Charles in the lease and attempted to hold it adversely to the owners, who were obliged to commence an action in the State Court to recover from him the possession of the tunnel (See *Byrnes vs. Douglass*, 42 Pac. R., 798), and these proceedings were commenced by him for

the purpose of avoiding the result of that action (pp. 69 and 70). If the decree in this proceeding is allowed to stand the result will be that the owners of the Atlantic mine and tunnel will be deprived of the best means of working their own mine by taking this tunnel from them and devoting it to the exclusive use of another for the purpose of working his own mine. A rehearing will at least satisfy this Court, we think, that the main question of law in the case is brought squarely before this Court by the evidence in the record, in which there is no substantial conflict.

The report of the Commissioners, which is confirmed by the decree of the Circuit Court, awards appellees the exclusive use of the tunnel through the Contact mine, a distance of 299 feet from its mouth (Report second, p. 32).

The Commissioners, by their report, find that J. M. Douglass is the owner of an undivided one-half of the Contact mine and the appellants H. C. Biggs and Maggie Lee McMillan each own an undivided quarter thereof (Report first, p. 32), yet they award no compensation to these co-tenants of J. M. Douglass, who, by the decree, are deprived of any use whatever of the best means of working the Contact mine.

This Court sustained this finding on the ground that the tunnel was of no value. The proof shows that this 299 feet of tunnel was run through solid blasting rock, that it could not have been run at the time of the hearing for less than \$7 per foot with the tools and materials for blasting added (p. 124), and that the cost of cleaning out that part of the tunnel and laying the rails was 30 cents per foot (p. 104).

The amount of the owner of the additional one-half interest in the canal was such as there would be a legal demand to construct this 200 feet. It was made of the 1000 acres that it would have cost him to construct a which was not less than \$2,000, and under the Constitution of Nevada this property would not have been taken without just compensation to the owner. When payment is taken, as this was, from the owner and devoted exclusively to the use of another, compensation must be paid.

Central Pacific vs. Washburn, 6 Cal., 421

This Court said that "compensatory value" was produced before the Commissioners that "it was a benefit rather than a disadvantage to the intervening lands by being made roads by the canal which was an 'improvement'."

Where is the benefit in view of the finding of the Commissioners, approved by the Court, that appellants are entitled to the right of way through these lands, "and while the value of the same, and of the amount of way of such lands, is not to be taken into account in determining the value of the property, as provided by section 10, article 10 of the Constitution, p. 211.

It was within the province or jurisdiction of the Commissioners to make such finding—as it was for them to determine who were the owners of the lands through which the canal was to run.

The sole duty of the Commissioners was "to ascertain and assess the compensation to be paid" Sec. 4, Act of 1861.

In case of adverse or conflicting claims to the compensation the Court itself must determine the right thereto (Sec. 8, Ibid).

These proceedings are "*special*" (Sec. 2), and the Statute must be strictly pursued.

Respectfully submitted,

W. E. F. DEAL,
Atty. for Appellants.

We hereby certify that the foregoing petition is in our judgment well founded and that it is not interposed for delay.

W. E. F. DEAL and
EDMUND TAUSZKY,
Of Counsel.

Dated San Francisco, October 14th, 1897.





